1

No. 05-431 SEP 8 2005

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In The

Supreme Court Of The United States

JOHN P. BURKE, in his Official Capacity as Banking Commissioner of the State of Connecticut,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is the interpretation of the Office of Comptroller of the Currency as to the preemption of state law under the National Bank Act entitled to judicial deference?

2. Do the provisions of the National Bank Act and the regulations promulgated thereunder by the Office of Comptroller of the Currency preempt state law licensing and regulatory authority over state-chartered operating subsidiaries of national banks?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Second Circuit, which is the court whose judgment is sought to be reviewed, were Wachovia Bank, N.A. (plaintiff-appellee), Wachovia Mortgage Corporation (plaintiff-appellee), and John P. Burke, in his official capacity as Banking Commissioner of the State of Connecticut (defendant-appellant).

The following participated as *amicus curiae*: Office of the Comptroller of the Currency; American Bankers Association, America's Community Bankers, Consumer Bankers Association, Consumer Mortgage Coalition, Financial Services Roundtable, New England Legal Foundation, North American Securities Administrators Association, Inc., Conference of State Bank Supervisors, and Attorneys General of Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CITATIONS TO OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

I. THE SECOND CIRCUIT'S DECISION TO AFFORD DEFERENCE TO THE OCC'S VIEW OF PREEMPTION OF STATE LAW IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS 10

II. THE ISSUE OF PREEMPTION OF STATE AUTHORITY OVER OPERATING SUBSIDIARIES OF NATIONAL BANKS IS A MATTER OF SERIOUS IMPORTANCE TO THE STATES AND WAS ERRONEOUSLY DECIDED BY THE SECOND CIRCUIT 15

A. State Regulation of Mortgage Lenders Seeks to Protect Consumers from Abusive Practices and Represents a Matter of Vital Public Importance ...16

B. The Second Circuit Erroneously Accepted OCC's Expansion of the National Bank Act's Preemption to Operating Subsidiaries 21

1. The OCC's Interpretation of the Scope of the National Bank Act's Preemption Does Not Satisfy the Requirements for Deference Under the *Chevron* Doctrine 21

a. Section 484 Only Preempts State Visitorial Authority as to National Banks Themselves, and Operating Subsidiaries Are Not National Banks 23

b. The National Bank Act's Grant of "Incidental" Powers Does Not Preempt the Commissioner's Authority Over Wachovia Mortgage 25

2. The Rationale Underlying § 7.4006 Reflects An Unreasonable Interpretation of the Provisions of the National Bank Act 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990)..... 12, 13

BankWest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005)..... 11

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996)..... 21

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)..... 12

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)..... passim

Colorado Pub. Utils. Comm'n v. Harmon, 951 F.2d 1571 (10th Cir. 1991)..... 11

Dole Food Co. v. Patrickson, 538 U.S. 468, (2003); *accord United States v. Bestfoods*, 524 U.S. 51 (1988)..... 27

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)..... 22, 23

Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973)..... 13

Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982)..... 21

Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910 (3d Cir. 1981) 14

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 17

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 12, 13

National City Bank of Ind. v. Turnbaugh, 367 F. Supp. 2d 805 (D. Md. 2005), *appeal pending*, No. 05-1647 (4th Cir.) 10

NationsBank of North Carolina v. Variable Annuity Life Insurance Co., 513 U.S. 251 (1995) 12

New York v. FERC, 535 U.S. 1 (2002) 13

Santa Fe Industries v. Green, 430 U.S. 462 (1977) 21

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 12, 26

Solomon v. Gilmore, 248 Conn. 769, 731 A.2d 280 (1999) 16

University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002) 14

Wachovia Bank v. Burke, 319 F. Supp. 2d 275 (D. Conn. 2004) 2, 9

Wachovia Bank v. Burke, 414 F.3d 305 (2d Cir. 2005) 1, 9, 11, 25

Wachovia Bank, N.A. v. Watters, 334 F. Supp. 2d 957 (W.D. Mich. 2004), *appeal pending*, No. 04-2257 (6th Cir.) 10

Wells Fargo N.A. v. Boutris, 419 F.3d 949 (9th Cir. (2005) 10

Statutes and Regulations:

12 U.S.C. § 24(Seventh) 3, 25, 26

12 U.S.C. § 26 24

12 U.S.C. § 27 24

12 U.S.C. § 221 24

12 U.S.C. § 221a 3, 24

12 U.S.C. § 221a(b) 24

12 U.S.C. § 371(a) 3, 25, 26

12 U.S.C. § 481 24

12 U.S.C. § 484 ..... passim

12 U.S.C. § 484(a) 2, 23

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

42 U.S.C. § 1983 ..... 8, 9

12 C.F.R. § 5.34 ..... 18, 21

12 C.F.R. § 7.4000(a)(2) 23

12 C.F.R. § 7.4006 ..... passim

12 C.F.R. §§ 7.4007 to 7.4009 19

31 Fed. Reg. 11,459 (Aug. 31, 1966) 18, 21

66 Fed. Reg. 34784, 34788 (July 2, 2001) 21, 27

66 Fed. Reg. 34784, 34790 (July 2, 2001) 14, 21

Conn. Gen. Stat. title 36a 6

Conn. Gen. Stat. § 36a-1 6

Conn. Gen. Stat. § 36a-50 7

Conn. Gen. Stat. § 36a-51 7

Conn. Gen. Stat. § 36a-52 7

Conn. Gen. Stat. § 36a-511 7

Conn. Gen. Stat. § 36a-485 6

Conn. Gen. Stat. §§ 36a-485 to 36a-498 6

Conn. Gen. Stat. § 36a-485(6) 6

Conn. Gen. Stat. § 36a-486 ..... 6, 7, 8

Conn. Gen. Stat. § 36a-487(1) 7

Conn. Gen. Stat. § 36a-488 18

Conn. Gen. Stat. § 36a-492 18

Conn. Gen. Stat. § 36a-493 7

Conn. Gen. Stat. § 36a-494 7

Conn. Gen. Stat. § 36a-497 18

Conn. Gen. Stat. § 36a-498 18

Conn. Gen. Stat. § 36a-498a 18

Conn. Gen. Stat. §§ 36a-510 to 36a-524 7

Conn. Gen. Stat. § 36a-510(10) 6

Conn. Gen. Stat. § 36a-511 ..... 6, 8

Conn. Gen. Stat. § 36a-512(4) 7

Conn. Gen. Stat. § 36a-513 18

Conn. Gen. Stat. § 36a-516 7

Conn. Gen. Stat. § 36a-517 7

Conn. Gen. Stat. § 36a-519 18

Conn. Gen. Stat. § 36a-521 18

Conn. Gen. Stat. § 36a-524 18

Conn. Gen. Stat. § 36a-705 to 36a-707 18

Conn. Gen. Stat. § 36a-705 18

Conn. Gen. Stat. § 36a-707 18

Conn. Gen. Stat. § 36a-716 18

Conn. Gen. Stat. § 36a-717 18

Conn. Gen. Stat. § 36a-746a 18

Conn. Gen. Stat. § 36a-746c 18

Conn. Gen. Stat. § 36a-746e 18

Conn. Gen. Stat. § 36a-755 18

Conn. Gen. Stat. § 36a-756 18

Conn. Gen. Stat. § 36a-757 18

Conn. Gen. Stat. § 49-5b 18

Conn. Gen. Stat. § 49-6a 18

Conn. Gen. Stat. § 49-6c 18

Conn. Gen. Stat. § 49-6d 18

Cal. Fin. Code §§ 50000 – 50510 16

Fla. Stat. §§ 494.001 – 494.00797 16

Mass. Gen. L. ch. 183c, §§ 1 – 19 16

Mich. Comp. L. §§ 445.1651 – 445.1684 16

N.J. Stat. §§ 17:11C-1 to 17:11C-49 16

N.C. Gen. Stat. §§ 53-243.01 to 53.243.16 16

Other Authorities:

Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANK & FIN. L. 225, 232 (2004) 15, 18, 20

Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 72-74 (2005) 15, 20

Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1008-09 (1999) 14

House-Senate Conf. Comm. Report on Riegle-Neal Interstate Banking Act, H.R. Rep. 103-651, at 53, *reprinted in* 1994 U.S. Code Cong. & Admin. News 2068, 2074 ..... 16, 17

Remarks of Edward M. Gramlich, Federal Reserve Board, *Subprime Mortgage Lending: Benefits, Costs, and Challenges* (May 21, 2004) 17

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1024 (1992) 14

Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORN. J.L. & PUB. POLICY 203, 210-11 (2004)..... 14

U.S. GENERAL ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 8-20 (Jan. 2004)..... 17, 18, 19

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WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, John P. Burke, in his official capacity as Banking Commissioner of the State of Connecticut, respectfully prays that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered in this case on July 11, 2005.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), and is reprinted in the Appendix hereto at A1 - A31.

The memorandum of decision of the United States District Court for the District of Connecticut is reported at *Wachovia Bank v. Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004), and is reprinted in the Appendix hereto at A32 – A56.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 11, 2005. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

Article VI of the U.S. Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 484(a) of the National Bank Act (12 U.S.C. § 484(a)) provides:

> No national bank shall be subject to any visitorial power except as authorized by Federal law, vested in the courts of justice or such as shall be, or shall have been exercised or directed by Congress or of either House duly authorized.

Section 24(Seventh) of the National Bank Act (12 U.S.C. § 24(Seventh)) provides, in pertinent part:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –
>
> * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking. . . .

Section 371(a) of the National Bank Act (12 U.S.C. § 371(a)), provides, in pertinent part:

> Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

Section 221a of the National Bank Act (12 U.S.C. § 221a) provides, in pertinent part:

> As used in this chapter -
>
> * * *
>
> (b) Except where otherwise specifically provided, the term "affiliate" shall include any corporation, business trust, association, or other similar organization -

(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

(2) Of which control is held, directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or

(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank; or

(4) Which owns or controls, directly or indirectly, either a majority of the shares of capital stock of a member bank or more than 50 per centum of the number of shares voted for the election of directors of a member bank at the preceding election, or controls in any manner the election of a majority of the directors of a member bank, or for the benefit of whose shareholders or members all or substantially all the capital stock of a member bank is held by trustees.

Section 7.4006 of Title 12 of the Code of Federal Regulations provides:

> Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank

operating subsidiaries to the same extent that those laws apply to the parent national bank.

STATEMENT OF THE CASE

This case involves an effort to divest States of their traditional authority to license and regulate state-chartered mortgage lenders. Under the guise of a regulation purporting to define the scope of preemption of state law's application to national banks, the Office of the Comptroller of the Currency ("OCC") and the national banks it regulates have joined forces to undermine state authority to protect the public from abusive mortgage lending practices.

The plaintiffs' complaint sought to enjoin the defendant from enforcing Connecticut's laws regulating the business of first and secondary mortgage loans against the plaintiff Wachovia Mortgage Corporation ("Wachovia Mortgage"), an operating subsidiary of the plaintiff, Wachovia Bank, N.A. ("Wachovia Bank"). These laws are designed principally to ensure the protection of consumers. The plaintiffs maintain that Wachovia Mortgage, a state-chartered corporation, is exempted from these state licensing and regulatory laws for the sole reason that it is owned by a nationally chartered bank. Although Congress has expressly preempted certain state authority over nationally chartered banks, it has not done so with regard to their operating subsidiaries, which remain creatures of state law.

The District Court had jurisdiction over this action pursuant to *28 U.S.C. § 1331* inasmuch as the plaintiffs alleged claims arising under the U.S. Constitution and federal law.

The defendant John P. Burke is the Banking Commissioner of the State of Connecticut ("Commissioner") and was sued in his official capacity. Under Connecticut law, the Commissioner has authority to administer and enforce the banking laws of the State. Conn. Gen. Stat. title 36a.

Connecticut's banking laws require that, with certain specified exceptions, any entity engaged in the business of making first or secondary mortgage loans[1] be licensed and subject to the Commissioner's regulatory authority. *See* Conn. Gen. Stat. § 36a-1. Specifically, § 36a-486 of the Connecticut General Statutes provides:

> No person shall engage in the business of making first mortgage loans or act as a first mortgage broker in this state unless such person has first obtained the required license in accordance with the provisions of sections 36a-485 to 36a-498, inclusive.[2]

Similarly, § 36a-511 of the General Statutes provides:

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[1] A first mortgage loan is defined under Connecticut law as a loan made primarily for personal or family purposes that is secured by a first mortgage on residential real property. Conn. Gen. Stat. § 36a-485(6). A secondary mortgage loan is defined as a loan made primarily for personal or family purposes secured by a mortgage on residential property that is already subject to one or more prior mortgages. Conn. Gen. Stat. § 36a-510(10).

[2] Sections 36a-485 to 36a-498 set forth various aspects of the first mortgage licensing process, including exemptions, applications, denials, fees, bonds, and revocations.

> No person shall engage in the business of making secondary mortgage loans or act as a secondary mortgage broker unless such person has first obtained the required license under sections 36a-510 to 36a-524, inclusive.[3]

A national bank is exempted from the licensing requirements of §§ 36a-486 and 36a-511, but a subsidiary of a national bank is expressly not exempted. Conn. Gen. Stat. §§ 36a-487(1), 36a-512(4).

A first or secondary mortgage licensee is required to maintain adequate records of its mortgage loan activities and to make such records available to the Commissioner upon request. Conn. Gen. Stat. §§ 36a-493, 36a-516. The Commissioner may, after notice and hearing, suspend, revoke, or refuse to renew a license for, among other reasons, fraud, misappropriation, or violations of the banking laws. Conn. Gen. Stat. §§ 36a-51, 36a-494, 36a-517. The Commissioner is further authorized to take appropriate measures to enforce the banking laws, including the imposition of civil penalties, issuance of cease-and-desist orders, and the institution of superior court actions for injunctive relief. Conn. Gen. Stat. §§ 36a-50, 36a-52.

Wachovia Bank is a national banking association chartered under the National Bank Act. Wachovia Mortgage, a wholly owned subsidiary of Wachovia Bank, is a corporation incorporated under the laws of the State of North Carolina. Wachovia Mortgage is engaged, or intends to be engaged, in the business of making first and secondary mortgage loans in the State of Connecticut.

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[3] Sections 36a-510 to 36a-524 similarly set forth various aspects of the secondary mortgage licensing process.

Wachovia Bank is exempt from the licensing requirements of §§ 36a-486 and 36a-511, but Wachovia Mortgage must obtain licenses to conduct first and secondary mortgage lending in Connecticut.

The plaintiffs initiated this action in district court, seeking declaratory and injunctive relief. They alleged (1) that the defendant's authority under state law to license and regulate Wachovia Mortgage is preempted by the National Bank Act, 12 U.S.C. § 484, and the regulations promulgated by the OCC, the federal agency that regulates national banks; and (2) that the enforcement of such state laws violated the plaintiffs' federal rights under the National Bank Act, giving rise to an action under 42 U.S.C. § 1983.

The relevant facts are undisputed, and the matter was heard by the district court on cross-motions for summary judgment. The parties agree that Wachovia Mortgage intends to engage in the business of making of first and secondary mortgage loans, and that the Commissioner intends to enforce the requirements of Connecticut law regarding licensure against Wachovia Mortgage.

The plaintiffs claimed that federal law, and in particular 12 C.F.R. § 7.4006, preempts the defendant from enforcing state licensing and regulatory authority over Wachovia Mortgage. Section 7.4006 purports to extend 12 U.S.C. § 484, which prohibits state officials from exercising "visitorial powers" over national banks, to the operating subsidiaries of national banks. The defendant contended that the National Bank Act, pursuant to which § 7.4006 was promulgated, does not, and can not be reasonably interpreted, to extend the limitation on state visitorial powers under § 484 of the National Bank Act to

state-chartered non-bank operating subsidiaries of national banks. The defendant further contended that the plaintiffs' preemption claim does not provide a basis for a § 1983 claim.

The district court granted summary judgment in favor of both plaintiffs as to the preemption claim and in favor of Wachovia Bank as to the § 1983 claim. *Wachovia Bank v. Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004) (App. at A32).

On appeal, the court of appeals affirmed the judgment of the district court as to the preemption claim, but reversed on the § 1983 claim. The Second Circuit held that the OCC's view of the scope of the National Bank Act's preemption, as reflected in 12 C.F.R. § 7.4006, was reviewable under the deferential standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and under that standard was reasonable. The Second Circuit reversed the district court on the § 1983 claim, concluding that the National Bank Act did not create an enforceable federal right to be free of state regulation. *Wachovia Bank v. Burke*, 414 F.3d 305 (2d Cir. 2005) (App. at A1).

REASONS FOR GRANTING THE WRIT

A conflict now exists among the circuit courts of appeals on the question of according judicial deference to an administrative agency's interpretation of the preemptive effect of a statute. Deferring to an agency's view of preemption, as the Second Circuit did in this case, has been expressly rejected by the Tenth and Eleventh Circuits. This split on such a fundamental question implicating the exercise of state law authority deserves this Court's resolution.

Moreover, the preemption question presented is not of mere doctrinal interest. Instead, the states' ability to regulate mortgage lending and, in particular, to protect the public from predatory and abusive lending practices, is at stake. The Second Circuit's erroneous acceptance of the OCC's view of preemption, if left to stand, will seriously impair and undermine state law protections of home mortgage borrowers against the growing and potentially ruinous problem of predatory lending.[4]

I. THE SECOND CIRCUIT'S DECISION TO AFFORD DEFERENCE TO THE OCC'S VIEW OF PREEMPTION OF STATE LAW IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The OCC's view that federal preemption under the National Bank Act extends to national bank's operating subsidiaries is a classic legal question about the scope of the agency's preemptive authority. Unlike the Second Circuit, which deferred to the OCC, other circuits have refused to grant judicial deference to an agency's view on

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[4] This issue of preemption of state law authority over the operating subsidiaries of national banks is also raised in pending litigation in three other circuits. *See Wells Fargo N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005) (holding that the OCC's visitorial authority over national banks' operating subsidiaries preempted state authority under a deferential standard of review); *Wachovia Bank, N.A. v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich. 2004) (same), *appeal pending*, No. 04-2257 (6th Cir.); *National City Bank of Ind. v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) (same), *appeal pending*, No. 05-1647 (4th Cir.).

the fundamental matter of preemption. A conflict among the circuits thus exists that this Court needs to resolve.

In concluding that state law authority over the operating subsidiaries of national banks is preempted, the Second Circuit accepted the OCC's interpretation, rather than deciding for itself whether Congress had intended to oust state regulation. Applying the deferential standard of review of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Second Circuit evaluated only whether the OCC's view was reasonable. *Wachovia Bank*, 414 F.3d at 318 (App. at A-20).

Two other courts of appeals – the Tenth Circuit and the Eleventh Circuit – have explicitly rejected providing deferential review of an agency's opinion of federal preemption. Most recently, in *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005), the Eleventh Circuit Court of Appeals dismissed the notion that any judicial deference should be paid an agency's view of the preemptive effect of a statute. *Id.* at 1301 ("[W]e do not defer to agency positions, whether formal or informal, on preemptive issues."). Quoting from an earlier decision of the Tenth Circuit Court of Appeals, the *BankWest* court explained that "[b]ecause 'a preemption determination involves matters . . . more within the expertise of the courts than within the expertise of an administrative agency, we need not defer to an agency's opinion regarding preemption." *Id.* (quoting *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (holding no deference to agency view of preemption)).

This Court has expressly left open the question whether judicial deference should be accorded an agency

opinion on preemption.[5] In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court noted the distinction between an agency's interpretation of the substantive meaning of a statute, which may receive judicial deference, and the interpretation of the preemptive effect of a statute. *Id.* at 744. Because the provision at issue in *Smiley* clearly preempted state law, the Court stated "[w]e may assume (without deciding) that the latter question must always be decided de novo by the courts." *Id.*

"[I]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As this Court emphasized in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986):

> [A] federal agency may pre-empt state law only when it is acting within the scope of congressionally delegated authority. . . . [A]n agency literally has no power to act, let alone pre-empt validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.

Id. at 374. Thus, a "precondition" to judicial deference is a congressional delegation of authority to the agency. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

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[5] In *NationsBank of North Carolina v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995), the Court gave deference to the OCC's opinion that the sale of annuities was an incidental power to the business of banking under the National Bank Act. The OCC's opinion to which the Court deferred involved the substantive meaning of a statute, not its preemptive effect.

It follows, therefore, if Congress did not intend for an agency to have authority over a subject matter, there can be no deference to an agency's interpretation that it has such authority and that state law is preempted. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374. "[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Id.*; *accord New York v. FERC*, 535 U.S. 1, 18 (2002).

Deferring to an agency's view of the preemptive effect of a purported grant of statutory authority creates a classic logic trap. A court must first decide whether Congress has delegated authority to the agency. If *Chevron* or another doctrine of deference applies to questions of preemption, then the court must defer to the agency's reasonable interpretation. Yet, if the agency has exceeded its authority, no deference is due. The only way out of this circular trail of reasoning is to deny judicial deference to an agency's view of its own preemptive authority. *See Adams Fruit*, 494 U.S. at 650 ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

When § 7.4006 was adopted, the OCC expressly disavowed any preemptive effect of the regulation. It stated that the regulation "itself does not effect preemption of any State law; it reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and

applicable Federal judicial precedent." 66 Fed. Reg. 34784, 34790 (July 2, 2001).

Ironically, the OCC has insisted that the courts must nonetheless defer to what is nothing more than its view of the result that a federal court should reach. However, courts should not defer to an agency's interpretation of judicial decisions. *See University of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002). According deference to an agency's interpretation of how it thinks a court would interpret the scope of the agency's preemptive authority is the ultimate administrative bootstrap.

Moreover, there are good reasons for courts to be wary of an agency's interpretation of the extent of its own preemptive power. It is hardly a novel observation that agencies tend to have "an expansive view of their mission." *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981). The dangers of agency self-interest and aggrandizement warrant unfettered judicial review of an agency's scope of preemptive authority. *See* Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1008-09 (1999) ("[A]gencies have no comparative advantage in reading statutes, and . . . agency self-interest may cloud its judgment."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1024 (1992) ("[T]he decision to regulate may be motivated by designs for agency aggrandizement rather than by a disinterested assessment of statutory authority and appropriate policy."); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORN. J.L. & PUB. POLICY 203, 210-11 (2004).

The OCC, for example, has institutional interests in pushing the preemption envelope. Almost its entire budget

is funded by assessments paid by national banks. Extending preemption ever further creates an incentive for financial entities under state authority to seek a national charter, which in turn results in an expansion of the OCC's realm. *See* Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 72-74 (2005). Thus, OCC has a definite self-interest in obtaining the broadest possible sweep for national bank preemption. *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANK & FIN. L. 225, 232 (2004). Courts must act as the brake against such accretion of federal power at the expense of state authority.

This Court should grant certiorari to resolve the conflict among the circuits as to whether judicial deference to agency interpretations of the preemption of state law is appropriate.

II. THE ISSUE OF PREEMPTION OF STATE AUTHORITY OVER OPERATING SUBSIDIARIES OF NATIONAL BANKS IS A MATTER OF SERIOUS IMPORTANCE TO THE STATES AND WAS ERRONEOUSLY DECIDED BY THE SECOND CIRCUIT

The regulation of operating subsidiaries engaged on residential mortgage lending is a matter of vital importance to states. The scourge of predatory language has grown dramatically in recent years, and states must have the ability to regulate operating subsidiaries to respond effectively to this serious problem. By erroneously accepting the OCC's view of preemption, the Second

Circuit will have hamstrung states in their efforts to protect consumers.

A. State Regulation of Mortgage Lenders Seeks to Protect Consumers from Abusive Practices and Represents a Matter of Vital Public Importance.

The stakes are high in this case for states and the public they protect. Consumers will suffer serious harm, and the states' interests in protecting their citizens will be seriously impaired, if operating subsidiaries of national banks are permitted to engage in first and secondary mortgage lending without being licensed, examined and regulated by the states for such activities. Like similar statutes of other states,[6] Connecticut's statutes governing first and secondary mortgage lending "aim[] to protect consumers by prohibiting certain unscrupulous lending practices." *Solomon v. Gilmore*, 248 Conn. 769, 776-77, 731 A.2d 280 (1999). As Congress has recognized:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, ***regardless of the type of charter an institution holds***. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities.

House-Senate Conf. Comm. Report on Riegle-Neal Interstate Banking Act, H.R. Rep. 103-651, at 53, *reprinted*

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[6] *E.g.*, Cal. Fin. Code §§ 50000 – 50510; Fla. Stat. §§ 494.001 – 494.00797; Mass. Gen. L. ch. 183c, §§ 1 – 19; Mich. Comp. L. §§ 445.1651 – 445.1684; N.J. Stat. §§ 17:11C-1 to 17:11C-49; N.C. Gen. Stat. §§ 53-243.01 to 53.243.16.

in 1994 U.S. Code Cong. & Admin. News 2068, 2074 (emphasis added); *see Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980) ("[B]oth as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern.").

The states' interests in protecting consumers in the area of mortgage lending is vital, especially with regard to predatory lending and other deceptive and abusive lending practices. Predatory lending consists of a variety of unfair and deceptive lending practices that strip borrowers of the equity in their homes and often place them at risk of foreclosure and financial ruin. Such practices include excessive and undisclosed fees and closing costs, asset-based lending (loans based on equity in the mortgaged property rather than the borrower's ability to repay), repeated refinancing with high fees (known as "flipping"), imposition of prepayment penalties, and higher interest rates at closing than had been promised. *See* U.S. GENERAL ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 18-20 (Jan. 2004) ("GAO REPORT").

Predatory lending has grown dramatically with the explosion of subprime mortgage lending. Subprime lending generally refers to loans made to borrowers with impaired credit histories or high debt-to-income ratios and are therefore unable to qualify for traditional mortgage loans. Subprime lending has grown exponentially since the 1990s, and with it has grown the potential for abusive practices. *See* Remarks of Edward M. Gramlich, Federal Reserve Board, *Subprime Mortgage Lending: Benefits, Costs, and Challenges* (May 21, 2004) (available at www.federalreserve.gov/boarddocs/speeches/2004/20040522/default.htm). Operating subsidiaries of banks make up a

substantial portion of the subprime market. *See* GAO REPORT, *supra*, at 21-22; Wilmarth, *supra*, at 314-16.

Connecticut's laws provide benefits and protections for consumers not found in federal law. These include standards for licensure, Conn. Gen. Stat. §§ 36a-488, 36a-513; advance fee disclosures, *id.* § 36a-498; various mortgage-related consumer protection disclosures, *id.* § 36a-492, 49-5b, 49-6a, 49-6c, 49-6d; rate lock-in agreements, *id.* §§ 36a-705 to 36a-707; bond requirements, *id.* § 36a-492; prohibition on prepayment penalties, *id.* § 36a-519; prohibited provisions in mortgages, *id.* § 36a-746c; prohibited acts by lenders, *id.* § 36a-746e; prohibitions related to title, flood and fire insurance, *id.* §§ 36a-756, 36a-757; obligations on lenders related to mortgage servicing, *id.* §§ 36a-716, 36a-717; restrictions on advertising, *id.* §§ 36a-497, 36a-524; availability of appraisals to borrower, *id.* § 36a-755; and limits on prepaid finance charges, *id.* §§ 36a-498a, 36a-521, 36a-746a.[7]

Until the OCC issued § 7.4006 to preempt the application of state law to operating subsidiaries, the states licensed and regulated such entities under the kinds of laws described above. The OCC has allowed national banks to use operating subsidiaries since the promulgation of 12 C.F.R. § 5.34 in 1966. 31 Fed. Reg. 11,459 (Aug. 31, 1966). However, the OCC did not issue its preemption rule in § 7.4006 until some 35 years later in 2001.[8] Thus, the OCC's preemption rule is hardly one of longstanding; instead, it seeks to eliminate the traditional regulatory authority of the states.

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[7] Other states have similar laws. *See supra* note 6.

[8] Indeed, Wachovia Mortgage did not attempt to surrender its state license until late 2002, after the issuance of § 7.4006.

Preempting the application of state banking laws to operating subsidiaries of national banks will deprive the public of the panoply of consumer protections that are currently afforded by state law. This is in part the result of the OCC's adoption in 2004 of regulations purporting to define the scope of National Bank Act preemption generally. These regulations broadly preempt state law's application to national banks, excepting only those state laws that "incidentally" affect bank operations, such as generally applicable laws relating to contracts, torts, criminal law, debt collection, acquisition and transfer of property, taxation, and zoning. 12 C.F.R. §§ 7.4007 to 7.4009. Under these rules, states are preempted from enforcing against national banks a variety of laws designed to protect consumers with regard to, among other things, loan terms, fees, and disclosures. *Id.* By force of § 7.4006 – the regulation at issue here – this preemption would apply to the operating subsidiaries of national banks.

In addition to the added protections for consumers under state law, state banking regulators, because they have a local presence and, therefore, are more accessible to consumers, are in a better position than the OCC to assess and address such problems and assist consumers in their states. *See* GAO Report, at 10, 58-69 (discussing state efforts to combat predatory lending). By contrast, as one commentator recently concluded:

> Public policy does not favor entrusting the OCC with sole discretion and authority to enforce consumer protections laws against national banks and their operating subsidiaries. Virtually the entire OCC budget is funded by fees and assessments paid by national banks. The OCC therefore has an obvious self-interest in pursuing a preemption

> agenda that will encourage large, multistate banks to operate under national charters. In addition, during the past decade the OCC has not initiated a single public prosecution of a major national bank for violating a consumer protection law. The OCC's unimpressive enforcement record is, unfortunately, consistent with its strong budgetary interest in maintaining the loyalty of leading national banks. Given the OCC's financial self-interest and its empire-building agenda, the OCC faces a clear conflict of interests (and the risk of regulatory capture) whenever the agency considers the desirability of (i) preempting state consumer protection laws or (ii) taking vigorous enforcement measures against one of its most important constituents.

Wilmarth, *supra*, at 232; *see also* Peterson, *supra*, at 69-74, 77-84 (discussing the OCC's aggressive support of national banks in the banks' litigation against state regulators, its lax consumer protection regulation, and incentives created thereby for migration to national charters).

The OCC deserves no deference in its interpretation of the National Bank Act's preemption of state authority over state-chartered operating subsidiaries. The OCC's interpretation of the National Bank Act does not represent a reasonable weighing of competing policy concerns that Congress left to the agency to resolve. Instead, it represents a naked assault on the traditional authority of states to regulate state-chartered mortgage lenders. It is part of a comprehensive effort by the OCC and its regulated constituency to deprive the states of their ability to protect consumers.

B. The Second Circuit Erroneously Accepted OCC's Expansion of the National Bank Act's Preemption to Operating Subsidiaries.

In 2001, the OCC issued a new regulation that purports to extend the full reach of preemption under the National Bank Act to the operating subsidiaries of national banks.[9] 66 Fed. Reg. 34784 (July 2, 2001). Section 7.4006 of the OCC's rules provides: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006.

We begin from a basic proposition: "The rulemaking power granted to an administrative agency . . . is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Santa Fe Industries v. Green*, 430 U.S. 462, 472-73 (1977) (internal quotations omitted). Although agency regulations can have preemptive effect, *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), preemption remains a question of ***congressional***, not agency, intent. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996).

1. The OCC's Interpretation of the Scope of the National Bank Act's Preemption Does Not Satisfy the Requirements for Deference Under the *Chevron* Doctrine.

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[9] Section 7.4006 came thirty-five years after the OCC first promulgated a regulation in 1966 that permits national banks to use operating subsidiaries. *See* 12 C.F.R. § 5.34; 31 Fed. Reg. 11,459 (Aug. 31, 1966).

Wrongly applying the deferential standard of review of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Second Circuit acceded to the OCC's overreaching effort to block state regulatory authority. In *Chevron*, this Court directed:

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

For purposes of the *Chevron* analysis, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Thus, answering the question whether Congress has specifically addressed the question is an ordinary exercise of statutory construction, and if an unambiguous intent is demonstrated through the application of the rules of statutory construction, then a contrary construction by an

administrative agency is not entitled to deference. *Id.* at 132-33. Moreover, a reviewing court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133.

With these principles in mind, it is apparent that Congress has addressed the question. It simply has not chosen to extend the preemptive scope of the National Bank Act as far as the OCC would have liked.

a. Section 484 Only Preempts State Visitorial Authority as to National Banks Themselves, and Operating Subsidiaries Are Not National Banks.

Congress limited state authority over national banks in § 484 of the National Bank Act, which provides:

> No ***national bank*** shall be subject to any visitorial power except as authorized by Federal law, vested in the courts of justice or such as shall be, or shall have been exercised or directed by Congress or of either House duly authorized.

12 U.S.C. § 484(a) (emphasis added).[10] Section 484 thus precludes the exercise of visitorial authority by a state only as to a ***national bank***. The Commissioner, however, does not seek to exercise visitorial authority over a national

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[10] The OCC has defined visitorial powers to include bank examinations, inspection of books and records, regulation and supervision of banking activities, and enforcing compliance with any applicable federal or state law concerning those activities. 12 C.F.R. § 7.4000(a)(2).

bank. Instead, he seeks to exercise his state law authority over a state-chartered corporation. The simple fact is operating subsidiaries of national banks, such as Wachovia Mortgage, are separate state-chartered entities and are ***not*** national banks.

The term "national bank" in § 484 cannot be construed to include implicitly a national bank's operating subsidiaries. Under the National Bank Act, a national bank is a financial institution that has received a certificate of authority from the OCC to engage in the business of banking. 12 U.S.C. §§ 26, 27, 221, 221a. Obviously, Wachovia Mortgage does not satisfy that definition. Wachovia Mortgage does not have a national charter; it is incorporated under the laws of North Carolina. In this regard, it is no different than the thousands of other corporations doing business in the State of Connecticut that are incorporated under the laws of a state. Even as a wholly owned subsidiary of a national bank, Wachovia Mortgage remains a creature of state law and is not a national bank within the meaning of § 484. Nothing in the otherwise plain and unambiguous language of § 484 even hints that Congress contemplated extending the limitations on visitorial powers contained in that provision to state-chartered subsidiaries.

The National Bank Act separately defines an "affiliate" of a national bank as including a corporation owned or controlled by a national bank. 12 U.S.C. § 221a(b). Plainly, under this definition, Wachovia Mortgage is an affiliate of Wachovia Bank.

Under 12 U.S.C. § 481, the OCC may examine affiliates (including operating subsidiaries) of national banks. However, Congress has ***not*** given the OCC ***exclusive*** visitorial powers over such affiliates. The fact

that Congress chose not to include the term affiliate in § 484, when it has separately defined such entities, but instead gave the OCC nonexclusive authority over such affiliates, demonstrates that § 484 was not intended to have preemptive power beyond national banks themselves.

b. The National Bank Act's Grant of "Incidental" Powers Does Not Preempt the Commissioner's Authority Over Wachovia Mortgage.

The plaintiffs and the OCC have maintained that a national bank's incidental powers under § 24(Seventh), coupled with a national bank's authority to engage in real estate lending under § 371(a), preempts the Commissioner's authority. The Second Circuit deferred to the OCC view. *Wachovia Bank v. Burke*, 414 F.3d at 319-20 (App. at A22-A23). These provisions grant national banks certain powers. They do not evidence congressional intent to restrict a state's authority over a state-chartered subsidiary.

Section 24(Seventh) of the National Bank Act provides, in pertinent part, that national banks shall have "all such incidental powers as shall be necessary to carry on the business of banking. . . ." 12 U.S.C. § 24(Seventh). Section 371(a) provides that "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 18(o) of the Federal Deposit Insurance Act and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Like § 484, these provisions speak only to national banks and not to their operating subsidiaries.

The plaintiffs seek to blur the question of a national bank's authority to have operating subsidiaries and the question of the regulatory authority over such operating subsidiaries. However, that a national bank may have as one of its "incidental" powers under § 24(Seventh) of the National Bank Act the power to use an operating subsidiary in the mortgage lending business does not of itself resolve the issue of preemption. Similarly, the fact that a national bank may engage in mortgage lending under § 371(a) does not itself free the bank's operating subsidiaries from state regulation.

It simply does not follow that, if a national bank has the authority to have a wholly owned subsidiary engaged in a form of business that the national bank itself could conduct, the subsidiary is necessarily exempted from state regulation. The question of preemption of state law must be decided separately and with reference to Congress' intent under the National Bank Act. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996).

Although the power to own an operating subsidiary that engages in the mortgage lending business may be an incidental power granted by § 24(Seventh), that does not by any means infer that state authority over that subsidiary is preempted. If the mere grant of power to a national bank were sufficient to preempt state authority, there would be no need for Congress to have enacted § 484. Therefore, this general grant of authority cannot provide the evidence of congressional intent that is necessary for the preemption of state law.

In sum, as a matter of straight forward statutory construction, the National Bank Act only preempts state authority to regulate a national bank itself, and not operating subsidiaries of a national bank.

2. The Rationale Underlying § 7.4006 Reflects An Unreasonable Interpretation of the Provisions of the National Bank Act.

Even assuming that deferential review is appropriate under *Chevron*, the Second Circuit wrongly concluded that the OCC's view articulated in § 7.4006 is a reasonable interpretation of the National Bank Act's provisions. An examination of the OCC's attempted rationale for preemption exposes its illogic and inconsistency with congressional intent.

In adopting § 7.4006, the OCC paradoxically concluded that "operating subsidiaries are, in essence, incorporated departments or divisions of the bank. . . ." 66 Fed. Reg. 34784, 34788 (July 2, 2001). In other words, in the OCC's eyes, the state-chartered operating subsidiary is not a separate legal entity after all, but a mere department or division of the national bank. This depiction of operating subsidiaries as just another department or division of the bank runs counter to every basic principle of corporation law. It remains a "basic tenet of American corporation law" that a parent and its subsidiary corporations are distinct legal entities. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003); *accord United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). To overcome this bedrock rule the OCC needs something more than *ipse dixit*.

If the subsidiary is "in essence" a department or division, why then is it separately incorporated under state law? The answer, of course, is that a separate corporate existence is advantageous from a business perspective. Using operating subsidiaries for the mortgage lending

business protects the national bank's deposit base from exposure to liability arising from mortgage lending activities. This explains why national banks choose to incur the substantial costs involved in setting up and maintaining separate state-chartered corporations to carry on a business that could be conducted directly by the parent national banks.

Thus, the very reason that a national bank would choose to have an operating subsidiary engaged in mortgage lending is to take advantage of the shielding from liability that comes with the corporate separation inherent in the parent-subsidiary relationship. Without that separateness, the value of having an operating subsidiary involved in mortgage lending would be greatly diminished.

The plaintiffs and the OCC would have their proverbial cake and eat it too. Certainly, they do not mean to say that operating subsidiaries are in fact mere departments or divisions. If that were so, they would lose the benefits of corporate separateness. Yet, when it is to their advantage, the plaintiffs and the OCC characterize operating subsidiaries as akin to a department or division, lacking a separate corporate identity.

Although the law sometimes overlooks the separate existence of commonly controlled corporations, ignoring the fundamental tenet of corporate separateness in this instance cannot be justified. The very reason that national banks desire to use operating subsidiaries is the significant risk reduction benefits that come with corporate separateness. Thus, it is patently unreasonable to characterize operating subsidiaries as nothing more than a division of department of its parent national bank. If that characterization holds, the operating subsidiary loses the

very thing that makes it an attractive way of structuring the national bank's business.

This is not simply a matter of the law treating an entity differently for different purposes; this is one and the same purpose, and it ought to be treated in the same way. If a national bank has the authority as an incidental power to use operating subsidiaries, and thereby to take advantage of the protections from liability that corporate separateness brings, then the separate corporate identity of the operating subsidiary ought to be recognized and not mischaracterized as something else.

Therefore, even assuming that the OCC is entitled to judicial deference, which on this question it is not, its view of the scope of preemption represented in § 7.4006 is not reasonable and the Second Circuit erred in accepting it.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this Petition should be granted and a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PETITIONER,
JOHN P. BURKE, in his official capacity as Banking Commissioner of the State of Connecticut

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No. _____

In The

Supreme Court Of The United States

JOHN P. BURKE, in his Official Capacity as Banking Commissioner of the State of Connecticut,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005) A-1

Wachovia Bank, N.A. v. Burke, 319 F.Supp.2d 275 (D. Conn. 2004) A-31

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004
(Argued: May 31, 2005 Decided: July 11, 2005)

Docket No. 04-3770-cv

WACHOVIA BANK, N.A. AND WACHOVIA MORTGAGE CORPORATION,
Plaintiffs-Appellees,

—v.—

JOHN P. BURKE, IN HIS OFFICIAL CAPACITY AS BANKING COMMISSIONER OF THE STATE OF CONNECTICUT,
Defendant-Appellant.

Before:

MCLAUGHLIN, STRAUB, AND HALL, *Circuit Judges*.

Appeal from a final judgment of the United States District Court for the District of Connecticut (Janet C. Hall, *Judge*), which held that the National Bank Act and regulations promulgated by the Office of the Comptroller of the Currency preempt the application of certain Connecticut banking laws to Wachovia Mortgage Corporation, an operating subsidiary of Wachovia Bank, N.A., a national bank. The District Court further found that the National Bank Act provides national banks with federal

rights and that Connecticut's attempt to regulate Wachovia Bank's operating subsidiary gave rise to an action under 42 U.S.C. § 1983. We agree that federal law preempts state regulation of a national bank operating subsidiary to the same extent that it preempts regulation of the parent national bank. We find, however, that the National Bank Act does not provide national banks with rights enforceable under § 1983.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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Douglas B. Jordan, Counsel for the Office of the Comptroller of the Currency (Daniel P. Stipano, Acting Chief Counsel; Horace G. Sneed, Director of Litigation, *on the brief*), Washington, D.C., *for the Office of the Comptroller of the Currency as amicus curiae in support of Appellees*.

Frederick C. Schafrick, Goodwin Procter LLP

(Thomas M. Hefferon, Goodwin Procter LLP; Joseph M. Kolar, Jeremiah S. Buckley, Buckley Kolar LLP, *on the brief*), Washington, D.C., *for the American Bankers Association, America's Community Bankers, Consumer Bankers Association, Consumer Mortgage Coalition, and Financial Services Roundtable as amici curiae in support of Appellees.*

STRAUB, *Circuit Judge*:

Defendant-Appellant John P. Burke, in his official capacity as Banking Commissioner of the State of Connecticut ("the Commissioner"), appeals from a decision of the United States District Court for the District of Connecticut (Janet C. Hall, *Judge*) granting summary judgment in favor of Plaintiffs-Appellees Wachovia Bank, N.A. ("Wachovia Bank"), a nationally chartered bank, and its wholly owned, state-chartered subsidiary Wachovia Mortgage Corporation ("Wachovia Mortgage") (together "Wachovia"). The plaintiffs brought an action for declaratory and injunctive relief to prevent enforcement of certain Connecticut banking laws against Wachovia Mortgage on the ground that the state laws are preempted by the National Bank Act ("NBA"), 12 U.S.C. § 21 *et seq.*, and regulations issued by the Office of the Comptroller of the Currency ("OCC"). The plaintiffs also asserted claims under 42 U.S.C. § 1983 for violation of rights allegedly provided by the NBA. On cross-motions for summary judgment, the District Court found that OCC regulations preempt the application of the state laws to Wachovia Mortgage. *Wachovia Bank, N.A. v. Burke*, 319 F. Supp. 2d 275, 281-88 (D. Conn. 2004). It further held that the NBA provided Wachovia Bank with rights enforceable under 42 U.S.C. § 1983 but that the NBA provided no such rights to

Wachovia Mortgage. *Id.* at 288-90.

The precise preemption issue is whether the NBA and OCC regulations preempt state banking laws concerning operating subsidiaries of nationally chartered banks. No court of appeals has addressed this issue, although several district courts have done so and have reached the same conclusion as the District Court in this case. We agree with the finding of preemption in this case. The NBA grants powers to national banks, including "incidental powers" necessary to carry on the business of banking, *see* 12 U.S.C. § 24 (Seventh), and it provides that national banks, in the exercise of their powers, shall be free from state "visitorial" power, *see* 12 U.S.C. § 484. The OCC, meanwhile, has issued regulations allowing national banks to conduct business through an operating subsidiary, *see* 12 C.F.R. § 5.34(e), and providing that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank," 12 C.F.R. § 7.4006. These regulations define a national bank's "incidental powers" to include conducting business through an operating subsidiary, and they preempt state visitorial power over operating subsidiaries to enable national banks to exercise this incidental power. We defer to these regulations because they are reasonable and within the OCC's authority under the NBA.

We must, however, reverse the District Court's holding with respect to Wachovia Bank's claim under 42 U.S.C. § 1983. Although the key provision, 12 U.S.C. § 484, prevents states from infringing on the power of national banks, the NBA focuses on national banks as federal instrumentalities empowered as part of a national banking system to the benefit of the national economy as a whole. There is no clear intent to benefit national banks as private entities with individual rights, and the powers

granted to national banks simply operate to establish federal regulatory authority vis-à-vis the states.

BACKGROUND

The following facts are not in dispute. Connecticut has enacted a series of banking laws with enforcement power delegated to the Commissioner. As explained by the District Court, six Connecticut banking statutes are at issue in this case. Two statutes require state licenses for first and secondary mortgage lenders. *See* Conn. Gen. Stat. §§ 36a-486(a), 36a-511(a). Two statutes require mortgage lenders to maintain certain records and to make them available for inspection by the Commissioner. *See id.* §§ 36a-493, 36a-516. And two involve the Commissioner's power to enforce the law through proceedings and the issuance of cease and desist orders. *See id.* §§ 36a-50, 36a-52. A national bank is exempted from the licensing requirements but a subsidiary of national bank expressly is not exempted. *See, e.g., id.* §§ 36a-486, 36a-487(1).

Wachovia Bank is a national banking association organized under the NBA. Wachovia Mortgage is a North Carolina corporation that was initially engaged in making first mortgage loans and has been licensed in Connecticut to do so since 1987. On January 1, 2003, Wachovia Mortgage became a wholly owned subsidiary of Wachovia Bank and surrendered its mortgage licenses with the Commissioner. On February 24, 2003, the Commissioner issued a Notice of Intent to Issue a Cease and Desist Order against Wachovia Mortgage for engaging in the first mortgage lending business in Connecticut without a license. Pursuant to a stipulation with the Commissioner, dated March 31, 2003, Wachovia Mortgage agreed to apply for re-licensing while reserving its right to seek legal action. Wachovia Mortgage also applied for a license to

engage in secondary mortgage lending.

On April 25, 2003, Wachovia Mortgage and Wachovia Bank filed suit in the United States District Court for the District of Connecticut, requesting declaratory and injunctive relief on the ground that the NBA and OCC regulations preempt the state laws' application in this case. The plaintiffs also brought claims under 42 U.S.C. § 1983 for abridgement of rights allegedly provided by federal law.

Upon cross-motions for summary judgment, the District Court found that the Connecticut banking statutes conflict with, and are preempted by, the NBA and OCC regulations – 12 C.F.R. § 7.4006 in particular. Applying the *Chevron* doctrine, the District Court found first that Congress has not spoken on the precise issue of "whether state law should apply to a subsidiary of a national bank in the same way as it applies to the national bank itself." The court further found that section 7.4006 was a reasonable regulation designed to prevent state laws from inhibiting a national bank's ability to conduct banking through a subsidiary, as authorized under 12 U.S.C. § 24 (Seventh).

With respect to the § 1983 claims, the District Court found that the NBA, through 12 U.S.C. § 24 (Seventh) and § 484, provides national banks with the "right" to be free from state regulation. The District Court thus granted summary judgment in favor of Wachovia Bank on its § 1983 claim. The court, however, found that Congress did not provide "rights" to operating subsidiaries, and it granted summary judgment to the Commissioner on Wachovia Mortgage's § 1983 claim. The District Court entered a declaratory judgment in favor of the plaintiffs on the preemption issue and in favor of Wachovia Bank on its

§ 1983 claim, and it closed the case.[1] The Commissioner timely appealed and now challenges the preemption and § 1983 rulings.[2] Wachovia Mortgage does not challenge the dismissal of its § 1983 claim.

DISCUSSION

We review *de novo* a district court's decision to grant summary judgment. *See Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005). In this case, the parties agree that the appeal solely involves legal issues and that there are no disputed facts. The legal issues are: (1) whether the NBA and OCC regulations preempt the Connecticut laws' application to Wachovia Mortgage, and (2) whether the NBA provides Wachovia Bank with rights enforceable under 42 U.S.C. § 1983.

No court of appeals has addressed whether the OCC regulations preempt state regulation of operating

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[1] The District Court did not grant Wachovia Bank any relief on its § 1983 claim apart from the declaratory relief that flowed from the preemption claim. Wachovia Bank did not obtain attorneys' fees pursuant to 42 U.S.C. § 1988.

[2] We have received three *amicus curiae* briefs. In support of the appellant, the Attorneys General of Forty States and the Conference of State Bank Supervisors ("Attorneys General Amici") reiterate the Commissioner's arguments and emphasize states' interests in regulating subsidiaries to protect consumers from unscrupulous lending practices. In support of the appellees, the OCC filed a brief that parallels Wachovia's argument. Also supporting Wachovia, the American Bankers Association and other national trade associations ("ABA Amici") filed a brief focusing on the reasonableness of the OCC's policy judgment in effecting preemption.

subsidiaries. Three district courts have reached this precise issue and have found preemption based on essentially the same reasoning used by the District Court in this case. *See Nat'l City Bank of Ind. v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) ("*Turnbaugh*"); *Wachovia Bank v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich 2004) ("*Watters*"), *appeal docketed*, No. 04-2257 (6th Cir. Oct. 14, 2004); *Wells Fargo Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003) ("*Boutris*"), *appeal argued*, No. 03-16197 (9th Cir. Nov. 4, 2004).[3] *Watters* and *Boutris* also decided the § 1983 issue, and, contrary to the District Court in this appeal, they found that the NBA does not create federal rights for national banks. *See Watters*, 334 F. Supp. 2d at 965; *Boutris*, 265 F. Supp. 2d at 1176-78. We first lay out the statutory and regulatory framework before addressing the preemption and § 1983 issues in turn.

I. <u>The Federal Statutory and Regulatory Framework</u>

In 1864, Congress enacted the NBA[4] "to facilitate . . . a national banking system." 17 *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (internal quotation omitted). In pertinent part, the NBA establishes nationally chartered banks and grants

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[3] The same district judge who decided *Boutris* issued essentially the same ruling in a later case involving the preemption of California law regarding operating subsidiaries. *See Nat'l City Bank of Ind. v. Boutris*, No. Civ. S-03-0655, 2003 WL 21536818 (E.D. Cal. July 2, 2003), *appeal argued*, No. 03-16461 (9th Cir. Nov. 4, 2004).

[4] Act of June 3, 1864, ch. 106, 13 Stat. 99. The Act of June 3, 1864 was re-titled the National Bank Act by the Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123, 123 (codified at 12 U.S.C. § 38)

these banks certain powers, including "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). To prevent inconsistent or intrusive state regulation from impairing the national system, the NBA provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." 12 U.S.C. § 484(a). These tenets are longstanding, as § 24 (Seventh) is derived from the NBA's initial enactment in 1864 and the restriction on state visitorial power traces back to 1913. *See* Act of June 3, 1864, ch. 106, § 8, 13 Stat. at 101; Federal Reserve Act, ch. 6, § 21, 38 Stat. 251, 272 (1913).

The OCC is the federal agency entrusted with the "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). It has the power to promulgate rules and regulations and may use its rulemaking authority to define the "incidental powers" of national banks beyond those specifically enumerated in the statute. *See id.*; *see also* 12 U.S.C. § 93a (authorizing OCC "to prescribe rules and regulations to carry out the responsibilities of the office"). An OCC regulation declares that, subject to certain exceptions, the OCC has exclusive visitorial powers over national banks, including the power to examine national banks, inspect their records, and regulate their activities authorized by federal banking law. 12 C.F.R. § 7.4000.

Pertinent to this case, the OCC promulgated 12 C.F.R. § 5.34, which provides that a "national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking." 12 C.F.R. § 5.34(e)(1). Section 5.34 establishes federal licensing requirements and examination procedures for

operating subsidiaries and provides that an "operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." *Id.* § 5.34(e)(3). This rule reflects the OCC's determination that a national bank's use of an operating subsidiary is an appropriate incidental power authorized under 12 U.S.C. § 24 (Seventh). *See* Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,348-55 (Nov. 27, 1996) (announcing comprehensive revisions to section 5.34); *see also* Financial and Operating Subsidiaries, 65 Fed. Reg. 12,905 (Mar. 10, 2000) (codifying section 5.34 substantially in its current form).

In 2001, shortly after making pertinent revisions to 12 C.F.R. § 5.34, the OCC promulgated 12 C.F.R. § 7.4006, which declares: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." *See generally* Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,791 (July 2, 2001) (announcing final rule). The OCC stated that the new rule "clarified" the applicability of state law to operating subsidiaries and explained the basis for the rule as follows:

> The majority of commenters who addressed this issue supported the proposal. Many of these commenters said that it is a permissible exercise of the authority granted by the National Bank Act for national banks to create operating subsidiaries that exercise both direct and incidental powers under 12 U.S.C. Section 24(Seventh). These commenters noted that operating subsidiaries have long been authorized for national banks and provide national

> banks with a convenient alternative to conduct activities that the bank could conduct directly. Further, they agreed that operating subsidiaries are, in essence, incorporated departments or divisions of the bank and, accordingly, should not be treated differently than their parent banks under State laws.

Id. at 34,788 (reiterating commenters' view as the basis for the rule); *see also* Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 8178, 8181 (Jan. 30, 2001) (providing same reasoning in Notice of Proposed Rulemaking). The OCC noted that section 7.4006 does not itself preempt any particular state law. *See* 66 Fed. Reg. at 34,790. But the implication is that state laws effecting visitorial power over national bank operating subsidiaries – through licensing requirements, for example – would be preempted, just as they are preempted as applied to national banks. *See id.* at 34,788.

A similar interplay of statutes and regulations exists specifically with respect to national banks' real estate lending powers. Pursuant to 12 U.S.C. § 371, national banks may "arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Under the authority of § 371(a), the OCC promulgated part 34 of title 12 of the Code of Federal Regulations "to set forth standards for real estate-related lending and associated activities by national banks." 12 C.F.R. § 34.1(a). Part 34 "applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34." *Id.* § 34.1(b). Section 34.3 contains the general rule authorizing national banks' real estate lending activities while section 34.4 addresses preemption:

> Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and [12 C.F.R.] § 34.3 without regard to state law limitations.

Id. § 34.4(a). Licensing requirements are specifically listed as a prohibited state limitation. *Id.* § 34.4(a)(1). As the OCC indicated when promulgating 12 C.F.R. § 7.4006, the combined effect of 12 C.F.R. § 34.1(b) and § 34.4 is that state regulation of real estate lending by national bank operating subsidiaries may be preempted. *See* 66 Fed. Reg. at 34,788 n.14.[5]

II. Preemption

The preemption doctrine is rooted in the Supremacy Clause of the Constitution. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152 (1982); *see also* U.S. Const. art. VI, cl. 2. Preemption can generally occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves

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[5] That footnote states: "Several commenters also requested that the final rule [12 C.F.R. § 7.4006] include, as an example, the express statement that 12 CFR 34 (Real Estate Lending and Appraisals) applies to operating subsidiaries. Inclusion of this statement in new § 7.4006 is unnecessary, however, because current § 34.1(b) already provides that part 34 applies to national banks and their operating subsidiaries." 66 Fed. Reg. at 34,788 n.14

no room for state law, or where federal law conflicts with state law. *See Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996); *De la Cuesta*, 458 U.S. at 153; *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 491 (5th Cir. 2003). This case indisputably involves "conflict preemption," which can arise where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De la Cuesta*, 458 U.S. at 153 (internal quotations and citations omitted).

"Federal regulations have no less pre-emptive effect than federal statutes." *Id.* Federal courts have recognized that the OCC may issue regulations with preemptive effect. *See, e.g., Wells Fargo Bank of Tex.*, 321 F.3d at 493-94; *Conf. of State Bank Supervisors v. Conover*, 710 F.2d 878, 882, 885 (D.C. Cir. 1983). Congress has expressly recognized the OCC's power to preempt particular state laws by issuing opinion letters and interpretive rulings, subject to certain notice-and-comment procedures. *See* 12 U.S.C. § 43.

Preemption is always a matter of congressional intent. *De la Cuesta*, 458 U.S. at 152. But the Supreme Court has made it clear that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law" and that a "narrow focus" on Congress's intent to supercede state law is "misdirected." *Id.* at 154. The proper focus is on whether the agency effecting preemption "has exceeded [its] statutory authority or acted arbitrarily." *Id.*; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (calling "express statement of pre-emptive intent" unnecessary for conflict preemption); *Wells Fargo Bank of Tex.*, 321 F.3d at 493 ("[W]e are concerned with whether Congress intended to delegate to the OCC the authority to [promulgate its

regulation], not with whether Congress intended that state law would be preempted.").

There is typically a presumption against preemption in areas of regulation that are traditionally allocated to states and are of particular local concern. *See Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005), *petition for cert. filed*, No. 04-1553 (May 16, 2005). "The presumption against federal preemption disappears, however, in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area." *Id.* (citations omitted); *see also United States v. Locke*, 529 U.S. 89, 108 (2000) (explaining operation of presumption generally); *Barnett Bank*, 517 U.S. at 32-33 (documenting the long history of federal regulations preempting state laws that purport to govern federally chartered banks); *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (tracing federal preemption as to national banks back to *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819)). States have a legitimate role in regulating certain banking activity, and it is often said that we have a "dual banking system" of federal and state regulation. *See generally Nat'l State Bank v. Long*, 630 F.2d 981, 985-86 (3d Cir. 1980); *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 136-37 (D. Conn. 1999). Nonetheless, state regulation is preempted if it will "significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33; *see also id.* at 32 (explaining that history of national banking legislation "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law").

Given these principles, the Commissioner

incorrectly attempts to frame the issue as whether Congress has expressly and clearly manifested an intent to preempt state visitorial power over operating subsidiaries. The focus, rather, is on the reasonableness of the OCC's exercise of its regulatory authority. *See De la Cuesta*, 458 U.S. at 153-54. The District Court properly approached the issue through the framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See NationsBank*, 513 U.S. at 257-58 (applying the *Chevron* doctrine to determine whether OCC was authorized to grant a national bank's application to sell annuities); *Wells Fargo Bank of Tex.*, 321 F.3d at 492-95 (applying *Chevron* and deferring to agency rule preempting state law concerning check-cashing fees).[6] Pursuant to

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[6] Other courts addressing NBA preemption issues have not applied *Chevron* but have adopted a similar approach requiring deference to a reasonable regulation issued within the OCC's authority. *See Bank of Am.*, 309 F.3d at 562-63; *Turnbaugh*, 367 F. Supp. 2d at 814-19 (identifying *De la Cuesta* as establishing a distinct framework for preemptive regulations but also applying *Chevron* and reaching the same result under both analyses); *Boutris*, 265 F. Supp. 2d at 1170 (concluding, without reference to *Chevron*, that 12 C.F.R. § 7.4006 has preemptive force because it "reflects a reasonable construction of the [NBA]"); *but cf. Watters*, 334 F. Supp. 2d at 963-65 (applying *Chevron* analysis and deferring to OCC regulations at issue in this case). Neither party has questioned that the *Chevron* framework generally applies in this case. In any event, the analysis would be the same even if we did not apply *Chevron* itself. Under *De la Cuesta*, which addressed preemptive regulations in a decision prior to *Chevron*, we would review the OCC regulations "only to determine whether [the agency] has exceeded [its] statutory authority or acted arbitrarily," and we would enforce the regulations unless they are

Chevron, we ask, first, "whether the intent of Congress is clear as to the precise question at issue." *NationsBank*, 513 U.S. at 257 (internal quotation omitted). If Congress's intent is clear, "that is the end of the matter. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (internal quotation and citation omitted). If there is an ambiguity, we must "give great weight to any reasonable construction" of the statutes by the OCC. *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403 (1987); *see also NationsBank*, 513 U.S. at 257; *De la Cuesta*, 458 U.S. at 153-54.

A. Whether Congress Has Addressed the Issue; Whether the Regulations Are Within the OCC's Authority Under the Statutory Scheme

The District Court properly identified the precise question as whether Congress has addressed the manner in which state law should apply to a national bank operating subsidiary. As the District Court recognized, 12 U.S.C. § 484 is the anchor for preemption in providing that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." Section 484 does not address a national bank's operating subsidiary, and the Commissioner argues that, based on this omission, Congress intended not to preempt state laws concerning operating subsidiaries. The Commissioner also argues that operating subsidiaries are national bank "affiliates," as

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unreasonable or inconsistent with the statutory scheme. *De la Cuesta*, 458 U.S. at 154.

provided in 12 U.S.C. § 221a, and that other statutes governing affiliates evince an intent not to provide the OCC or federal government with exclusive visitorial power. The District Court properly rejected these arguments.

First, the Commissioner's argument concerning § 484 fails to account for how preemption actually arises in this case. The OCC does not purport to define the term "national bank," as used in § 484, to include an "operating subsidiary." Instead, the OCC has interpreted a national bank's "incidental powers" under 12 U.S.C. § 24 (Seventh) to include the power to conduct the business of banking through an operating subsidiary. *See* 12 C.F.R. § 5.34. The OCC then promulgated 12 C.F.R. § 7.4006 to codify its belief that states should not be able to obstruct this power by imposing regulations on the subsidiary that could not be imposed on the parent bank. It is undisputed that, as a general matter, the "'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). Moreover, neither the Commissioner nor the Attorneys General Amici dispute that the OCC is empowered to authorize national banks to use operating subsidiaries in conducting their business of banking. To the extent that using an operating subsidiary is a legitimate power granted to national banks, 12 U.S.C. § 484 provides the OCC with ample authority to preempt states from exercising visitorial power over the subsidiary because such state regulation could interfere with the national bank's exercise of its federal powers. *See Barnett Bank*, 517 U.S. at 33 (explaining that state laws are preempted if they "significantly interfere with the national bank's exercise of its powers").

The Commissioner's second argument concerning "affiliates" is more nuanced but fares no better. As the Commissioner explains, the Banking Act of 1933 (the "Glass-Steagall Act") enacted 12 U.S.C. § 221a(b), codifying the term "affiliate" to "include any corporation, business, trust, association, or similar organization" that is directly or indirectly controlled by a "member bank." *See* Banking Act of 1933, ch. 89, § 2(b), 48 Stat. 162, 162.[7] The Glass-Steagall Act also enacted 12 U.S.C. §§ 161(c) and 481, giving the OCC what the Commissioner characterizes as "non-exclusive regulatory authority" over national bank affiliates. The Commissioner argues that a subsidiary like Wachovia Mortgage falls within the definition of an "affiliate" in 12 U.S.C. § 221a(b), that Congress declined to give the OCC exclusive visitorial authority over affiliates, and that Congress thus evinced an intent not to preempt state laws over operating subsidiaries.

As the District Court observed, however, the definition of "affiliates" plainly covers a category of entities much broader than operating subsidiaries, and operating subsidiaries do not fit neatly into these provisions of the Glass-Steagall Act. The Glass-Steagall Act arose out of Congress's belief "that commercial bank involvement in underwriting and securities speculation had unduly placed bank assets at risk and had contributed to the widespread bank closings that occurred during the Great Depression." *Sec. Indus. Ass'n v. Bd. of Gov'rs of the Fed. Reserve Sys.*, 716 F.2d 92, 97 (2d Cir. 1983) (internal quotations

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[7] There is no contention that Wachovia Bank is not a "member bank," which includes any "national bank, State bank, or bank or trust company which has become a member of one of the Federal reserve banks." 12 U.S.C. § 221.

omitted), *aff'd*, 468 U.S. 207 (1984). The 1933 Act was aimed principally at that concern and "the inherent conflict between the promotional role of an investment banker and the commercial banker's obligation to give disinterested investment advice." *Id.* at 98. For example, the Act introduced a key amendment to 12 U.S.C. § 24 (Seventh) to limit national banks' purchasing and selling of securities and to preclude their underwriting the issuance of securities. *See* Glass-Steagall Act § 16, 48 Stat. at 184-85. Thus, as the District Court found, the Glass-Steagall Act targeted national banks' use of affiliates to engage in non-commercial banking and does not address national banks' use of operating subsidiaries to engage in the business of banking.

Moreover, it was not until the 1960s that the OCC first recognized national banks' use of a "subsidiary operations corporation" to conduct "functions or activities . . . that a national bank is authorized to carry on." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,459 (Aug. 31, 1966). That regulation reflected the OCC's interpretation of national banks' powers under 12 U.S.C. § 24 (Seventh) in light of the "ever changing and growing" business of banking that had "developed rapidly during recent years" and that called for more flexibility in national banks' ability to structure their banking activities. 31 Fed. Reg. at 11,460.

With the passage in 1999 of the Gramm-Leach-Bliley Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338, Congress, at least implicitly, recognized the unique role of operating subsidiaries. In enacting 12 U.S.C. § 24a, the GLBA authorized national banks to control "financial subsidiaries" pursuant to certain conditions and requirements, but it excluded from the definition of

"financial subsidiary" a subsidiary "that engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). The GLBA's legislative history expressly recognizes the use of operating subsidiaries as provided by the OCC:

> For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations.

S. Rep. No. 106-44, at 8 (1999).[8] Similarly, 12 U.S.C. §§

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[8] In 1996, prior to the GLBA, the OCC promulgated 12 C.F.R. §§ 5.34 and 34.1(b) to allow national banks to conduct business through operating subsidiaries pursuant to the same authorization, terms, and conditions that apply to the parent national bank. The OCC understood the GLBA as affirming its regulation of operating subsidiaries and promptly revised 12 C.F.R. § 5.34 "to make conforming changes and streamline procedures for banks that engage in activities through operating subsidiaries." *See* Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,905 (Mar. 10, 2000). In 2001, the OCC promulgated 12 C.F.R. § 7.4006 and cited the GLBA's recognition of operating subsidiaries as a basis for that rule.

371c and 371c-1 provide distinct treatment to operating subsidiaries by restricting bank transactions with affiliates but excluding subsidiaries from the definition of "affiliate" for those provisions.

Even if operating subsidiaries can fall under the definition of "affiliate" for some purposes, there is still no manifest congressional intent to preclude the OCC regulations in this case. The Commissioner relies on 12 U.S.C. §§ 161(c) and 481, arguing that they grant the OCC non-exclusive regulatory power over affiliates and that, by implication, do not allow the OCC to preempt state visitorial power over any affiliate. But §§ 161(c) and 481 simply provide, respectively, that national bank affiliates shall report to the OCC and that the OCC shall examine affiliates to disclose the relations between the national bank and the affiliate.[9] These provisions do not speak broadly to the allocation of visitorial power between the federal and state governments. They primarily reflect Congress's concern with national banks' engaging in non-commercial bank business and do not address or contemplate national banks' later-emerging power to engaging in the business of banking through operating subsidiaries. These provisions thus do not address whether state laws regarding operating subsidiaries may be preempted as interfering with national banks' incidental powers under 12 U.S.C. § 24 (Seventh) and 12 C.F.R. § 5.34.

Overall, the history of the banking laws indicates that operating subsidiaries have been treated distinctly by Congress and the OCC, and no statute speaks directly to the

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See Investment Securities, Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001).

[9] Both provisions were part of the Glass-Steagall Act §§ 27-28, 48 Stat. at 191-93.

scope of federal versus state power over them. Particularly with the passage of the GLBA, it appears that Congress has intentionally left open a gap concerning the treatment of national bank operating subsidiaries. The OCC has the authority to fill that gap by defining a national bank's incidental powers to include conducting the business of banking – business that the national bank itself could conduct directly – through an operating subsidiary. *See* 12 C.F.R. §§ 5.34. Having so defined a national bank's power to conduct business through an operating subsidiary, the OCC further has the authority to preempt states law concerning operating subsidiaries to the same extent that those laws would be preempted with respect to the parent national bank. *See* 12 C.F.R. §§ 7.4006, 34.1, 34.4.

B. The Reasonableness of the OCC's Regulations

Having concluded that Congress has not addressed the precise issue in this case and that the OCC generally has the authority to promulgate the regulations at issue, we must defer to the regulations if they reflect a reasonable construction of the statutory scheme. *See NationsBank*, 513 U.S. at 257; *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982). The Commissioner attacks the reasonableness of the rationale for 12 C.F.R. § 7.4006 provided in the Federal Register. He also argues that we should not defer to section 7.4006 because it merely reflects the OCC's view of what a court would hold. Neither argument has merit as the OCC regulations reflect reasonable policy determinations.

1. The Rationale Underlying 12 C.F.R. § 7.4006

The Commissioner focuses on and attacks a particular rationale expressed for 12 C.F.R. § 7.4006: that "operating subsidiaries are, in essence, incorporated

departments or divisions of the bank and, accordingly, should not be treated differently than their parent banks." 66 Fed. Reg. at 34,788. The Commissioner argues that this rationale unreasonably disregards the corporate separateness of a parent bank and improperly allows national banks to take advantage of the legal benefits of conducting business through a subsidiary while remaining free from state regulation as if the subsidiary were itself part of the parent national bank.

We disagree. There is nothing unreasonable about the OCC's rationale. The OCC is not disregarding any principle of corporate separateness; it is recognizing that "[f]or decades national banks have been authorized to use the operating subsidiary as a convenient and useful corporate form for conducting activities that the parent bank could conduct directly." 66 Fed. Reg. at 34,788. Section 7.4006 reflects the OCC's policy judgment that national banks' use of operating subsidiaries as separately structured corporate entities is desirable and that it should not be hindered by state regulations.

This rationale is developed more fully in the Federal Register entries concerning 12 C.F.R. § 5.34. For example, the OCC has noted that "the use of a separate subsidiary structure can enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring of its operations." Rules, Policies and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,354 (Nov. 27, 1996); *see also* Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,908-09 (Mar. 10, 2000). This rationale for permitting national banks to conduct business through operating subsidiaries dates back to 1966, when the OCC explained: "The use of controlled

subsidiary corporations provides national banks with additional options in structuring their businesses. National banks may desire to exercise such option for many reasons, including controlling operations costs, improving effectiveness of supervision . . . or separating particular operations of the bank from other operations." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,460 (Aug. 31, 1966). Thus, the OCC has long maintained that an operating subsidiary is legally distinct from the parent bank but is connected to the parent bank's ability to conduct business in a safe and sound manner. The OCC's well-explained policy judgment is reasonable and entitled to deference.

2. Whether Section 7.4006 Simply Reflects the OCC's View of Case Law

The Commissioner's next argument arises out of the OCC's discussion of an Executive Order that requires certain notice-and-comment procedures for agency regulations with federalism implications and preemptive effect. *See* Exec. Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999). In addressing whether the Executive Order applied to the promulgation of 12 C.F.R. § 7.4006, the OCC explained that the proposed changes

> do not affect the OCC's intention to address questions of preemption on a case-by-case basis, according to preemption principles derived from the United States Constitution, as interpreted through judicial precedent. Section 7.4006 generally provides that national bank operating subsidiaries are subject to State law to the extent State law applies to their parent bank. The section itself does not effect preemption of State law; it reflects the conclusion we believe a federal court would reach,

> even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent.

66 Fed. Reg. at 34,790. The Commissioner seizes on the last sentence in arguing that 12 C.F.R. § 7.4006 merely reflects the OCC's view of what courts would hold, and he contends that courts are not required to defer to an agency's interpretation of case law. To this extent, the Commissioner cites *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002), and *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002). Both cases involve adjudicative decisions by the NLRB and stand for the proposition that such decisions are not necessarily entitled to deference to the extent that they rely solely on the interpretation of federal judicial decisions; courts, rather than agencies, have expertise in interpreting case law.

In this case, however, the OCC's codification of section 7.4006, at its core, reflects a policy judgment about national banks' use of operating subsidiaries. Section 7.4006 "clarified" that state laws apply to operating subsidiaries to the same extent that they apply to the parent national bank, and the clarification reflects the OCC's view that preemption already existed based on the combination of federal statutes (12 U.S.C. §§ 24 (Seventh), 371, and 484) and preexisting regulations (12 C.F.R. §§ 5.34, 34.1(b), and 34.4). *See* 66 Fed. Reg. at 34,788 & n.14. The body of the discussion on section 7.4006 plainly indicates the OCC's position that national banks should be able to "use the operating subsidiary as a convenient and useful corporate form for conducting activities" without substantial restrictions imposed by states. *See id.* at 34,788. The discussion is also replete with language indicating a policy determination based on "safety and soundness"

considerations rather than any pure interpretation of law. *See id.* at 34,789.

Even if the policy determination were not manifest in section 7.4006, it is extensively developed in the OCC's recent revision of 12 C.F.R. part 34, which was designed to demarcate more clearly what state laws are and are not preempted with respect to real estate lending activities. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004).[10] There the OCC explained that 12 U.S.C. § 24 (Seventh) provides a "flexible grant of authority" to national banks to further "Congress's long-range goals in establishing the national banking system." *Id.* at 1907. The OCC noted that achievement of these goals requires national banks "whose powers are dynamic and capable of evolving" because "the financial services marketplace has undergone profound changes" in recent years. *Id.* The OCC specifically observed that "[c]hanges in applicable law also have contributed to the expansion of markets for national banks and their operating subsidiaries." *See id.* The OCC found, however, that "national banks' ability to conduct operations to the full extent authorized by Federal law has been curtailed as a result" of increasing state efforts to regulate bank activities. *Id.* at 1908. As an example, the OCC pointed to its recent ruling that the Georgia Fair Lending Act ("GFLA") was preempted from applying to national banks and their operating subsidiaries. *See id.* (citing Preemption Determination and Order, 68 Fed. Reg. 46264-02 (Aug. 5, 2003)). The OCC stated that "the GFLA

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[10] Since 1996, 12 C.F.R. § 34.1(b) has stated that part 34 "applies to national banks and their operating subsidiaries as provided in 12 CFR § 5.34," and 12 C.F.R. § 34.4 has discussed the applicability of state law to national banks' real-estate lending powers.

caused secondary market participants to cease purchasing certain Georgia mortgages and many mortgage lenders to stop making mortgage loans in Georgia. National banks have also been forced to withdraw from some products and markets in other states as a result of the impact of state and local restrictions on their activities." *Id.*

Overall, the OCC concluded:

> When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions. The OCC therefore is issuing this final rule in furtherance of its responsibility to enable national banks to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws, consistent with the national character of the national banking system, and in furtherance of their safe and sound operations.

Id. (footnote omitted). This reasoning is consistent with, and is fairly imputed to, the OCC's statements concerning the other regulations in this case. Even if this reasoning could not be imputed to 12 C.F.R. § 7.4006, 12 C.F.R. §§ 34.1(b) and 34.4 independently support a finding of preemption in this case.

3. Conclusion on the Reasonableness of the OCC Regulations

For the reasons explained above, the OCC regulations reflect a consistent and well reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with national banks' exercise of their powers under 12 U.S.C. § 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending. While the Commissioner and Attorneys General Amici raise legitimate concerns about states' interest in protecting consumers and about the OCC's ability to regulate operating subsidiaries effectively, the OCC has responded to these concerns in its rulemaking. *See, e.g.*, 61 Fed. Reg. at 60,354-55 (justifying 1996 revisions to 12 C.F.R. § 5.34). The states' proper recourse at this point is to Congress. We must defer to the OCC's authorized and reasonable implementation of the NBA.

III. Wachovia Bank's Claims Under 42 U.S.C. § 1983

The next issue is whether the NBA provides Wachovia Bank with federal rights enforceable under 42 U.S.C. § 1983. A violation of the Supremacy Clause is distinct from, and does not necessarily give rise to, a violation of federal rights actionable under § 1983. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989); *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225 (2d Cir. 1987) ("A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law. The primary function of the Supremacy Clause is to define the relationship between state and federal law." (internal quotations omitted)). At the same

time, the fact that a federal statute preempts state law "does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy." *Golden State*, 493 U.S. at 108.

In *Blessing v. Freestone*, the Supreme Court explained that we "have traditionally looked at three factors" to determine whether a statute gives rise to a federal right:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. 329, 340-41 (1997) (internal quotations and citations omitted). The Supreme Court has clarified, however, that "it is only violations of *rights*, not *laws*, which give rise to § 1983 actions," and the Court has rejected an interpretation of *Blessing* that "our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Thus, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit" under § 1983. *Id.* at 286.

Moreover, the concurrence in *Gonzaga University* noted that the "statute books are too many, the laws too diverse, and their purposes too complex, for any single

formula to offer more than general guidance." *Id.* at 291 (Breyer, *J.*, concurring) (referring to *Blessing*). We understand the *Gonzaga University* majority and concurring opinions to mean, at least, that courts should not find a federal right based on a rigid or superficial application of the *Blessing* factors where other considerations show that Congress did not intend to create federal rights actionable under § 1983.

In this case, the District Court applied the *Blessing* factors and found that the NBA intended to create federal rights for national banks. As to the first factor, the District Court found that 12 U.S.C. § 484(a) – which makes national banks free from state visitorial authority – was written with "an unmistakable focus on the benefitted class" similar to the provisions of antidiscrimination statutes. The District Court further found that the right is sufficiently concrete for judicial enforcement and that the provision is phrased in mandatory, rather than precatory language. For the reasons explained below, however, the District Court's analysis fails to account for the unique role of national banks in the statutory scheme of the NBA. When viewed as a whole and in light of its history, it is plain that the NBA addresses the allocation of federal versus state regulatory power and does not provide national banks with rights enforceable under § 1983.

While the provisions at issue – 12 U.S.C. §§ 24 (Seventh), 371, and 484 – may focus on national banks, the structure and history of the provisions indicate that Congress did not intend to provide national banks with individual rights as private entities. As the Supreme Court explained in 1927: "National banks are not merely private moneyed institutions, but agencies of the United States created under its laws to promote its fiscal policies." *First Bank of Hartford, Wisc. v. City of Hartford*, 273 U.S. 548,

550 (1927) (internal quotation omitted) (addressing states laws taxing national banks). It has long been held that "[n]ational banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), *quoted by Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978); *see also Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954) ("The United States has set up a system of national banks as federal instrumentalities to perform various functions . . . ."); *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29 (1875) ("[N]ational banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."). Similarly, in *Easton v. Iowa*, the Court explained that the legislation creating and regulating national banks

> has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which . . . might impose limitations . . . . Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain.

188 U.S. 220, 229 (1909); *see also id.* at 230 (rejecting notion that "national banks are organized and their business prosecuted for private gain"). These cases, which indicate Congress's purpose in enacting the NBA, show that any focus on national banks – as relevant to the first *Blessing* factor – does not imply the creation of a federal right. On the contrary, Congress created national banks as

instruments to foster a national banking system. As the Supreme Court has stated: "[W]hen congressional preemption benefits particular parties only as an incident of the federal scheme of regulation, a private damages remedy under § 1983 may not be available." *Golden State*, 493 U.S. at 109.

Moreover, while *Blessing* dealt with Congress's exercise of its spending power, *see Blessing*, 520 U.S. at 333-34, the Supreme Court's decision in *Golden State* provides a slightly different approach to determining whether preemptive legislation creates federal rights, and *Golden State* undermines Wachovia Bank's argument under the NBA. In *Golden State*, which found that the National Labor Relations Act ("NLRA") both effected preemption and created federal rights, the Court distinguished between two kinds of preemption rules. *See Golden State*, 493 U.S. at 110. The first is based on *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and involves a rule of preemption that "is more akin to a rule that denies either [the federal or state] sovereign the authority to abridge a personal liberty." *Golden State*, 493 U.S. at 112. The second is the rule of *San Diego Building Trade Council v. Garmon*, 359 U.S. 236 (1959), that state jurisdiction over conduct protected by the NLRA is preempted "in the interest of maintaining uniformity in the administration of the federal regulatory jurisdiction." *Golden State*, 493 U.S. at 110; *see id.* (noting that the *Machinists* Rule and *Garmon* rule are "fundamentally distinct"). In *Golden State*, the Court allowed a claim under § 1983 after finding that Congress intended to give parties the ability to engage in peaceful methods of economic pressure free from government interference, whether by the federal or state government. *See id.* at 111-12.

In contrast, the issue in this case plainly involves a *Garmon*-related rule of preemption directed at "whether state or federal regulations should apply to certain conduct." *Id.* at 112. There is no suggestion that the NBA creates a "free zone from which all regulation, whether federal or State, is excluded." *Id.* at 111 (internal quotations and citation omitted). To the contrary, the OCC extended preemption of state laws concerning operating subsidiaries only after promulgating extensive federal regulatory requirements over those subsidiaries. *See generally* 12 C.F.R. § 5.34. Indeed, national banks' freedom from state regulation exists and expands as federal regulation of national banks becomes more defined. This dynamic indicates a preemptive scheme involved in "maintaining uniformity in the administration of the federal regulatory jurisdiction," as opposed to a scheme that also creates federal rights. *See Golden State*, 493 U.S. at 110.

In addition, despite the fact that the NBA's pertinent provisions are long-standing – 12 U.S.C. § 24 (Seventh) traces back to 1864 and § 484 traces back to 1913 – there is no indication of any other court finding that the NBA creates federal rights for banks. The only court of appeals to address the issue found that the NBA does not allow for actions under § 1983. *See First Nat'l Bank of Omaha v. Marquette Nat'l Bank of Minneapolis*, 636 F.2d 195 (8th Cir. 1980) (addressing 12 U.S.C. §§ 85 and 86, which deal with the rate of interest a national bank may charge on loans). We agree with the reasoning of the Court of Appeals for the Eighth Circuit that the powers granted to national banks do not involve "important personal rights akin to fundamental rights protected by the Fourteenth Amendment" where courts have typically allowed a claim under § 1983. *Id.* at 198. Thus, the presence of a superficial parallel between the language of 12 U.S.C. § 484 and the language in certain anti-discrimination provisions does not

compel an inference that Congress intended to provide national banks with federal rights.

Finding that Wachovia Bank has rights enforceable under § 1983 would likely allow national banks to pursue § 1983 claims whenever preemption exists by virtue of the NBA and OCC regulations. Such a finding is inappropriate in light of the complex regulatory framework and the ever-changing nature of the industry and the powers exercised by national banks. *See, e.g.*, Investment Securities, Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,790 (July 2, 2001) (addressing 12 C.F.R. § 7.4006 and expressing the OCC's intention to address preemption on a case-by-case basis). Allowing § 1983 claims in this context could also mean that § 1983 claims – and the potential for damages and attorneys' fees – may arise out of any number of regulatory statutes with preemptive effect and could have widespread repercussions for the balance of federal and state regulatory authority in general. Given the status of national banks as federal instrumentalities and the federal government's pervasive regulation of such banks, it is plain that the NBA involves a preemption scheme – a scheme to allocate power between the federal and state governments – and that there is no clear intent to provide national banks with federal rights enforceable under § 1983.

CONCLUSION

The District Court's entry of a declaratory judgment in favor of the plaintiffs on the basis of preemption is AFFIRMED. With respect to Wachovia Bank's claim under 42 U.S.C. § 1983, the District Court's grant of summary judgment in favor of Wachovia Bank is REVERSED, the denial of the Commissioner's motion for summary judgment is VACATED, and the case is

REMANDED to the District Court with instructions to enter partial summary judgment in favor of the Commissioner.

Each party shall bear its own costs.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION, Plaintiffs,	:	CIVIL No. 3:03-cv-0738(JCH)
v.	:	
JOHN P. BURKE, BANKING COMMISSIONER, Defendant.	:	JUNE 1, 2004

AMENDED RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT [DKT. NOS. 11, 21]

Wachovia Bank, N.A., and its wholly-owned subsidiary, Wachovia Mortgage Corporation, (collectively "plaintiffs") bring this suit against John P. Burke, Banking Commissioner of the State of Connecticut ("the Commissioner"), in his official capacity, seeking to enjoin his enforcement of certain Connecticut statutes that require businesses engaged in the making of first and second mortgage loans to obtain and maintain a Connecticut state license. The plaintiffs argue that the National Bank Act ("Act"), 12 U.S.C. § 21 et seq., and regulations promulgated by the Office of the Comptroller of the Currency ("OCC") preempt this licencing scheme as applied to Wachovia Mortgage. They seek a declaratory judgment and relief pursuant to

42 U.S.C. § 1983.[1] Both the plaintiffs and the Commissioner have moved for summary judgment.

I. BACKGROUND

Congress enacted the National Bank Act in 1864. The Act was designed to "facilitate . . . a national banking system." Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 314-15 (1978) (internal quotation omitted). It was further intended to "protect national banks against intrusive regulation by the States." Bank of Am. v. City and County of San Francisco, 309 F.3d 551, 561 (9th Cir. 2002).

In furtherance of these goals, the Act created a system by which so-called "national" banks would receive a federal charter and would be free from state "visitorial" power except as permitted by law or court order. See 12 U.S.C. § 484. These national banks are regulated by a federal agency, the OCC, which is charged with the supervision and regulation of national banks and the administration of the Act. 12 U.S.C. § 1 et seq. The Supreme Court has noted that this establishment of "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges" is "an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'" Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10 (2003) (quoting

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[1] Briefs amici curiae have been filed by: the OCC; the American Bankers Association, Consumer Mortgage Coalition, Consumer Bankers Association, and Electronic Financial Services Council ("American Bankers Association"); The New York Clearing House Association, L.L.C. ("The Clearing House"); and Forty-Three States and State Banking Officials ("State Banking Officials").

Tiffany v. Nat'l Bank of Missouri, 18 Wall 409, 412 (1874)).

Wachovia Bank is a national banking association organized under the National Bank Act. Wachovia Mortgage is a North Carolina corporation, initially engaged in the business of making first mortgage loans in, among other places, the state of Connecticut, and has been licensed to do so since March 5, 1987. Wachovia Mortgage became a wholly-owned subsidiary of Wachovia Bank on January 1, 2003. It is currently engaged in the business of making both first and secondary mortgage loans.

Connecticut has delegated authority to enforce banking laws to its Banking Commissioner. Six Connecticut banking statutes are at issue here. Two require licenses for first and secondary mortgage lenders (Conn. Gen. Stat. §§ 36a-486(a) and 36a-511(a)); two require mortgage lenders to maintain certain records and make them available for inspection by the Banking Commissioner (Conn. Gen. Stat. §§ 36a-493 and 36a-516); one permits the Commissioner to conduct enforcement proceedings (Conn. Gen. Stat. § 36a50); and one allows the Commissioner to issue cease and desist orders for violation of Connecticut banking laws (Conn. Gen. Stat. § 36a-52).

After it became a wholly-owned subsidiary of Wachovia Bank on January 1, 2003, Wachovia Mortgage declined to renew its mortgage-lending licence with the Commissioner. On February 24, 2003, the Commissioner issued a Notice of Intent to Issue a Cease and Desist Order ("Notice") against Wachovia Mortgage for engaging in the first mortgage lending business in Connecticut without a lending license since January 1, 2003. Wachovia Mortgage and the Commissioner eventually entered into a Stipulation and Agreement, dated March 31, 2003, whereby the

Commissioner withdrew the Notice and Wachovia Mortgage agreed to apply for relicensing, while reserving its right to seek judicial review or otherwise challenge the Commissioner's determination that it was subject to the licencing requirements. Wachovia Mortgage also applied for a Secondary Mortgage Lender License, because it desired to engage in the business of secondary mortgage lending in Connecticut.

The plaintiffs filed this suit on April 25, 2003, requesting injunctive and declaratory relief, on the grounds that the state's action is preempted by federal law under the Supremacy Clause of the United States Constitution,[2] and that the state's action deprives the plaintiffs of federal rights granted by the Act and OCC regulations, which rights are actionable pursuant to 42 U.S.C. § 1983. The parties have filed cross-motions for summary judgment.

II. DISCUSSION

A. Standard

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine

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[2] "'The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power-conferring provision, one that allocates authority between the national and state governments . . . .'" Western Air Lines, Inc. v. Port Auth. of New York and New Jersey, 817 F.2d 222, 226 (2d Cir. 1987) (quoting White Mountain Apache Tribe v. Williams, 810 F.2d 844, 848 (9th Cir. 1987)). The Supremacy Clause supports an action to enjoin enforcement of a state statute that "runs afoul of a federal legislative scheme." Id.

issues of material fact in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Marvel Characters, Inc. v. Simon, 310 F.3d 280, 286 (2d Cir. 2002). The parties agree that there are no issues of material facts in dispute. Thus, the court must determine whether plaintiffs or defendant are entitled to summary judgment as a matter of law.

B. The Statutes and Regulations at Issue

The court begins by surveying the scheme of laws and regulations that forms the basis of the this suit. Section 484(a) of the Act provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." This provision, on its face, evidences a broad intent to preempt state law as to national banks. Case law has established, however, that Congress did not intend to deprive the States of all of their power to regulate national banks. States may regulate "where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." Barnett Bank of Marion County, N.A., v. Nelson, 517 U.S. 25, 33 (1996) (citing cases).

The general powers granted to a national bank are delineated in 12 U.S.C. § 24(Seventh). Section 24(Seventh) gives national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." The Supreme Court has recognized that the powers "incidental" to the business of banking authorized by 12 U.S.C. § 24(Seventh) are not limited to those enumerated in section 24(Seventh). Instead, "the

Comptroller therefore has discretion to authorize activities beyond those specifically enumerated." NationsBank of North Carolina, N.A., v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 n.2 (1995).

More specifically, national banks also have the authority to conduct their activities through operating subsidiaries. The OCC first codified this power in 1966. See Wells Fargo Bank, N.A., v. Boutris, 265 F. Supp. 2d 1162, 1168 (E.D. Cal. 2003) (quoting Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459, 11,459-60 (Aug. 31, 1966)). At that time, the OCC explained that the power to operate through a subsidiary "may properly be found among such 'incidental powers' of the bank 'as shall be necessary to carry on the business of banking' within the meaning of 12 U.S.C. § 24(Seventh), or as incidental to another Federal banking statute . . . ." Id.

Today, a national bank's authority to operate through a subsidiary is embodied in 12 C.F.R. § 5.34. That section outlines the guidelines for establishing operating subsidiaries and authorizes national banks to "conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC or otherwise under statutory authority." 12 C.F.R. § 5.34(e)(1). In order to establish an operating subsidiary, a national bank must comply with the OCC's licensing requirements under section 5.34(b). See Wells Fargo, 265 F. Supp. 2d at 1167.

Congress itself has implicitly recognized the ability of a national bank to conduct its authorized activities through an operating subsidiary in the Graham-Leach-Bilcy Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338

(1999), codified, among other places, at 12 U.S.C. § 24a. That section does not mention operating subsidiaries, but expressly contemplates that national banks use "financial subsidiaries" to conduct banking business and further authorizes them to use such subsidiaries to conduct types of business, like securities underwriting, in which national banks themselves could not otherwise engage. See id. at § 24a(g)(3).

Unlike the non-banking business authorized by the GLBA, the mortgage-lending activities at issue here could be conducted directly by Wachovia Bank itself. A national bank's authority to engage in real estate transactions is found in 12 U.S.C. § 371(a), which "authorizes national banks to make real estate and other types of loans, and specifies security requirements for various forms of financing." Huntington Towers, Ltd., v. Franklin Nat'l Bank, 559 F.2d 863, 871 (2d Cir. 1977). Section 371 expressly delegates responsibility to the OCC for defining those powers. 12 U.S.C. § 371(a). The OCC does so in 12 C.F.R. § 34.1, which explicitly applies to "national banks and their operating subsidiaries," and sets forth standards for real estate lending and associated activities by national banks.

Finally, section 7.4006, which is the crux of the current controversy, specifies "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

C. Standing

As a preliminary matter, the Commissioner argues briefly that Wachovia Bank does not have standing to maintain this action. In essence, the standing inquiry

focuses on whether the plaintiff is the proper party to bring suit. See Baur v. Veneman, 352 F.3d 625, 632 (2d Cir. 2003). In order to have constitutional standing to pursue a claim, a plaintiff must demonstrate: (1) an injury in fact; (2) caused by the conduct complained of; (3) and that such injury is likely to be redressed by a favorable judicial decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); see also Lerman, 232 F.3d at 142.

The Commissioner argues that Wachovia Bank has no "injury" of its own. See Franchise Tax Bd. of Calif. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990) (parent must demonstrate some injury to itself, independent of the injury to its subsidiary). However, Wachovia Bank claims that the Commissioner's attempted enforcement against Wachovia Bank of the Connecticut statutes at issue impinges upon one of the Bank's right to be subject to the visitation of the OCC alone, except as otherwise authorized by federal law, and its power to conduct business "incidental to the business of banking" as authorized by 12 U.S.C. 24(Seventh). For this reason, and as discussed more fully below, in relation to the reasonableness of the OCC's promulgation of section 7.4006 and Wachovia Bank's section 1983 claim, the Bank has clearly alleged an "injury" of its own and has standing to pursue its claims. See, e.g., Baur, 352 F.3d at 632 (injury must be "concrete and particularized," as well as "actual or imminent, not conjectural or hypothetical") (quoting Lujan, 504 U.S. at 560).

D. Preemption Claim

Plaintiffs, and the OCC appearing as amicus on their behalf, argue that 12 C.F.R. § 7.4006, which makes state law applicable to a subsidiary in the same manner as to its parent, preempts the Commissioner's enforcement of

Connecticut General Statutes §§ 36a486, 36a-511, 36a-493, 36a-516, and of 36a-50 and 36a-52 when applied to the mortgage business of Wachovia Mortgage.

Preemption can occur in different ways. See Barnett Bank, 517 U.S. at 31. The plaintiffs here rely on "conflict" preemption. See Pls.' Opp. At 2. They argue that, under Section 7.4006, because the Commissioner cannot enforce the statutes at issue against Wachovia Bank, neither can he enforce them against Wachovia Mortgage.

1. Conflict

The primary conflict at issue here is that between the Commissioner's threatened enforcement of the Connecticut statutes as to Wachovia Mortgage, and section 7.4006. The Commissioner concedes that he could not enforce the statutes against Wachovia Bank itself, which, as discussed above, has been authorized by Congress to engage in real estate lending pursuant to 12 U.S.C. § 371 and which is subject exclusively to OCC "visitation" with regard to that banking activity. The Commissioner thus, in effect, concedes that the enforcement at issue is "visitation," but asserts his authority to regulate on the ground that Wachovia Mortgage is a subsidiary of, not itself, a "national bank" as specified in 12 U.S.C. § 484. This enforcement as to Wachovia Mortgage, but not as to Wachovia Bank, seemingly creates a direct conflict with section 7.4006, which requires that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

The Commissioner first argues that section 7.4006 is not a preemptive regulation. In theory, the parties agree that federal regulations "have no less pre-emptive effect

than federal statutes," Fidelity Federal Savings and Loan Assn. v. de la Cuesta, 458 U.S. 141, 153 (1982), and that federal agencies "may promulgate regulations that preempt state law." WFS Financial, Inc., v. Dean, 79 F. Supp. 2d 1024, 1026 (W.D. Wis. 1999). However, in the notes accompanying its promulgation of section 7.4006, the Commissioner notes that the OCC itself stated that the regulation "itself does not effect a preemption of any State law; it reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable federal judicial precedent." 66 Fed. Reg. § 34784, 34790 (July 2, 2001). The Commissioner thus argues that the OCC itself has expressly disclaimed the regulation's preemptive force.[3]

This statement does not constitute a waiver by the OCC of any claim that the state laws at issue are preempted by federal law, or more specifically, of a claim that section 7.4006 itself may conflict with state law so as to spark a conflict preemption analysis. Rather, the OCC's statement mirrors the same position it took in its brief and at oral argument: that the regulation "clarifies" the preemption that the OCC already understood to exist from a combination of pre-existing statutes – section 484, section 24(Seventh), and section 371 – and case law interpreting those existing provisions. In sum, OCC contends, not that there is no

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[3] The OCC emphasizes that it nonetheless complied with all of the procedures required for promulgating a preemptive regulation. 66 Fed. Reg. at 34790. It should be noted, however, that the Supreme Court, in United States v. Mead Corp., 533 U.S. 218 (2001), suggested that where administration of the Act is concerned, the OCC need not in all circumstances comply with the requirements for issuing a preemptive regulation. Id. at 231.

preemption, but that the preemption existed prior to the enactment of section 7.4006, which merely codifies it.

This type of interpretation and extrapolation is precisely the type of interpretation with which an administrative agency is charged. See, e.g., Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). Thus, for purposes of conflict analysis, the court highlights section 7.4006 as the relevant conflicting regulation and treats the OCC's statement that this regulation "clarifies" and codifies preexisting law as a statement of the regulation's reasonableness, assessed in relation to the second step of the Chevron analysis, below.[4]

2. Chevron Analysis

Where the legitimacy of an agency regulation is in question, the court follows the two-prong analysis found in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). There, the Supreme Court instructed a court addressing a preemption claim to determine, first, whether Congress has spoken directly on the precise question at issue; if the intent of Congress is clear, it is dispositive and the inquiry ends. If, however, the statute is silent or ambiguous as to the specific issue, the court must next examine whether the agency's action is "based on a permissible construction of the statute." Id. at 843. The regulations of an agency charged with administering a statute will stand as long as its interpretation of the statute is "reasonable." Bell v. Reno,

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[4] The plaintiffs and the OCC have specifically disclaimed at oral argument that any preemption at issue here stems from any of the OCC's interpretive letters. See, e.g., OCC Interpretive Letter #957 (March 2003), Ex. 3, Mem. Amicus Curiae of OCC [Dkt. No. 43].

218 F.3d 86, 90 (2d Cir. 2000).

The plaintiffs argue that Congress is silent as to the specific issue here – namely, whether state real estate licencing schemes are preempted as to a mortgage-lending, operating subsidiary of a national bank – and that the OCC's application of the law to subsidiaries in the same way as to their parents is reasonable. They argue that section 7.4006 is in effect the codification of the logical implication of case law interpreting the statutory preemption effected by Congress's broad prohibition of state visitation over national banks, 12 U.S.C. § 484, and of the OCC's authority to oversee the activities of national banks undertaken pursuant to 12 U.S.C. § 24 (Seventh).

The Commissioner argues the opposite. He contends that Congressional intent is clear on the question presented here; specifically, that Congress made an express choice to preempt only as to national banks, not to related entities. He further contends that, even if that intent to preempt is unclear, the OCC's promulgation of section 7.4006 was outside its authority and is thus entitled to no deference, and in any case is unreasonable.

a. Congressional Intent.

In conducting a so-called "Chevron" analysis, the first question to be addressed is whether Congress has spoken to the "precise question at issue." Chevron, 467 U.S. at 842. In determining Congressional intent, the court employs the "traditional tools of statutory construction." Bell, 218 F.3d at 90 (quoting Chevron, 467 U.S. at 843 n.9). As such, the court "should not confine itself to examining a particular statutory provision in isolation" but,

in keeping with the basics of statutory construction, should instead place words or phrases "in context." Brown & Williamson, 529 U.S. at 132-33.

Here, the "precise question at issue" is whether state law should apply to a subsidiary of a national bank in the same way as it applies to the national bank itself. The Act's preemption is anchored in section 484, in which Congress explicitly provided that no "national bank" would be subject to any visitorial powers "except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a). This provision does not speak expressly to subsidiaries of national banks. Indeed, as both sides conceded at oral argument, "subsidiaries" as they exist today were unknown at the time the Act was passed in the mid-nineteenth century.

As discussed above, Congress has since then implicitly recognized a national bank's authority to conduct its business through a subsidiary. See supra at 6-7. However, despite this implicit recognition of the use of subsidiaries to conduct banking business, Congress has nowhere spoken to the issue of state regulation of those subsidiaries. As a result, there is no explicit evidence of Congressional intent to preempt state regulation of those entities.

The Commissioner contends, however, that Congress has explicitly spoken to the issue through its treatment of national bank "affiliates." A portion of the Act added in 1933 by the Glass-Steagall Act, 48 Stat. 162, defines an affiliate as including a corporation owned or controlled by a national bank, 12 U.S.C. § 221a(b), and

gives the OCC authority to supervise those affiliates, 12 U.S.C. § 481.

That Act, however, but did not amend the preemption language of section 484 to include affiliates. The Commissioner argues that Wachovia Mortgage is "plainly" an affiliate of a national bank, and that, equally as plainly, Congress by omission intentionally declined to extend section 484 preemption to national bank affiliates.

While this argument has some superficial appeal, a closer look reveals that "affiliate" covers a much broader type of bank-related corporate entity than the operating subsidiaries at issue in this action, and further that an "operating subsidiary" like Wachovia Mortgage does not fit within that category.

The Glass-Steagall Act was one of several pieces of related legislation that provided for the protection of bank depositors in a number of ways. See also, e.g., Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. § 77a et seq; Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. § 78a et seq. It targeted specific abuses that Congress felt had led to the bank panics and closures that precipitated and characterized the Great Depression, especially the commingling of commercial and investment banks. See Indus. Assn. v. Bd. of Gov. of the Fed. Reserve Sys., 716 F.2d 92, 97-98 (2d Cir. 1983), aff'd, Sec. Indus. Assn. v. Bd. of Gov. of the Fed. Reserve Sys., 468 U.S. 137, 147 (1984) (Act's "design reflects the Congressional perception that certain investment banking activities are fundamentally incompatible with commercial banking").

One such abuse was the widespread use of bank deposits to underwrite "one security issue after another." United States v. Morgan, 118 F. Supp. 621, 645 (S.D.N.Y.

1953). Congress was also concerned about the "indirect pressure" that the affiliation of commercial banks with investment banks could cause, since "the pressure to sell a particular investment and to make the affiliate successful might create a risk that the bank would make its credit facilities more freely available to those companies in whose stock or securities the affiliate has invested or become otherwise involved." Investment Co. Inst. v. Camp, 401 U.S. 617, 631 (1971). As further assurance against improper transactions with associated firms of all types, the Glass-Steagall Act also amended the Federal Reserve Act, adding a requirement that loans to affiliates be "secured by collateral." Fitzpatrick v. Fed. Dep. Ins. Co., 765 F.2d 569, 573 (6th Cir. 1985).

Because of the Act, national banks were required to divest themselves of many affiliates. Morgan, 118 F. Supp. at 656 (discussing effect of the Act on J.P. Morgan & Co.). Despite these restrictions, however, the National Bank Act has continued to allow affiliates to conduct a range of business not permitted for a national bank itself. See, e.g., Sec. Indus. Assn. v. Bd. of Gov. of the Fed. Reserve Sys., 847 F.2d 890, 891-92 (D.C. Cir. 1988).

Congress's amendment of the National Bank Act to cover "affiliates" was thus directed at bank-related firms engaged in what Congress considered to be non-commercial bank functions, see, e.g., Blackfeet Nat'l Bank v. Nelson, 171 F.3d 1237, 1243 (11th Cir. 1999), not at operating subsidiaries conducting "the business of banking." First, both sides agree that modern subsidiaries, and more particularly, "operating subsidiaries" like Wachovia Mortgage, did not exist in 1933 and are thus different entities than the affiliates contemplated by Congress in the Glass-Steagall Act. Nor have operating subsidiaries been historically treated as "affiliates" of their

parent banks under section 23A of the Federal Reserve Act, 12 U.S.C. § 371c, 371c-1, which are the key federal banking law provisions governing transactions between banks and thrift institutions and their non-bank affiliates. See, e.g., Ronald R. Glancz, Financial Services Modernization 2003: Implementation of the Gramm-Leach-Biley Act (Am. Law Inst. 2003). Finally, in the GLBA, Congress singled out only financial subsidiaries, not operating subsidiaries, for treatment as national bank affiliates in certain situations. 12 U.S.C. § 371c(e)(2). Since the GLBA authorizes financial subsidiaries to conduct certain non-national bank functions formerly forbidden, Congress's decision to treat those financial entities as "affiliates" subject to state regulation is consistent with Congress's decision in the Glass-Steagall Act to designate certain bank-related entities engaged, to some extent, in non-commercial bank functions as "affiliates."

This does not support the Commissioner's suggested inference that "affiliates" includes operating subsidiaries engaged in the business of banking. The Commissioner thus cannot successfully categorize such operating subsidiaries as national bank affiliates sufficient to support a determination under the first step of Chevron that Congress clearly intended to include national bank operating subsidiaries under the "affiliate" umbrella.[5]

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[5] The Commissioner also argues more generally that Congressional silence in section 484 as to all entities but "national banks" equates to a prohibition; in other words, that Congress definitively intended to limit preemption to "national banks" themselves. While this silence might have been significant to the court were it to interpret the statute de novo, it does not answer the question asked by the first step of Chevron – namely, whether Congress has

Congress thus has not addressed the manner in which state law should apply to a national bank operating subsidiary. As a result, this is a situation where "Congress has not directly addressed the precise question at issue." Chevron, 467 U.S. at 843.

b. Agency Interpretation.

Once the court has determined that Congress's intent on the "precise question at issue" is not clear or that the statute is silent, it "does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." Chevron, 467 U.S. at 843. Instead, it must address whether "the agency's answer is based on a permissible construction of the statute." Id. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Id. at 844. This deference is appropriate because of the "agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." Brown & Williamson, 529 U.S. at 132.

(i) OCC's Authority.

The Commissioner first argues that, because section 7.4006 is not within the OCC's authority, it is entitled to no deference. This argument is unavailing.

"unambiguously expr[ess] [its] intent." Chevron, 467 U.S. at 843. Silence does not equate to a prohibition. Instead, for Chevron purposes, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843

Though the OCC is not explicitly referenced in section 484, its authority is established in 12 U.S.C. § 1,[6] and it is charged with the administration of the Act and bears "primary responsibility for surveillance of 'the business of banking' authorized by 12 U.S.C. 24(Seventh)," NationsBank of North Carolina, 513 U.S. at 256.[7]

Here, the OCC clearly has authority under section 24(Seventh) to regulate the establishment of subsidiaries by national banks, as outlined in the regulations guiding subsidiary establishment. See 12 C.F.R. § 5.34. The Supreme Court has consistently accorded deference to the OCC's decisions regarding a national bank subsidiary. See NationsBank of North Carolina, 573 U.S. at 254 (brokerage subsidiary); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987) (deferring to the OCC with regard to a securities subsidiary); Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978) (credit card subsidiary).

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[6] "The Comptroller of the Currency shall have the same authority over matters within the jurisdiction of the Comptroller as the Director of the Office of Thrift Supervision has over matters within the Director's jurisdiction under section 1462a(b)(3) of this title." 12 U.S.C. § 1.

[7] Further, it has administrative power pursuant to 12 U.S.C. § 1818 to issue cease and desist orders related to any national bank's violations of "law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank," or to prevent any "unsafe or unsound practice." First Union Nat'l Bank v. Burke, 48 F. Supp.2d 132, 137 (D. Conn. 1999).

Moreover, given Congress's charge to the OCC in 12 U.S.C. § 1818 to conduct surveillance of a national bank's compliance with any "law, rule, or regulation, or any condition imposed in writing by the agency," and to prevent any "unsafe or unsound practice" on the part of the bank, it is reasonable for the OCC to regulate the activities of national bank subsidiaries. As another court has observed, "it is plain that the Act delegated the OCC authority to promulgate 7.4006." Wells Fargo Bank, 265 F. Supp. 2d at 1170. The OCC has the authority to enact section 7.4006.

(ii) Reasonableness of § 7.4006.

The question for the court under the second step of Chevron is whether it was reasonable for the OCC to conclude, as it did in section 7.4006, that this OCC surveillance, as it applies to the activities here, should be exclusive and preemptive. This court concludes that it was.

An administrative agency's power to administer a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron, 467 U.S. at 843. "The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of [deference] with respect to his deliberative conclusions as to the meaning of these laws." Camp, 401 U.S. at 627.

Congress explicitly granted national banks the authority to engage in real estate lending in 12 U.S.C. § 371. It implicitly recognized their power to create operating subsidiaries engaged in the "business of banking" in the GLBA. 12 U.S.C. § 24a(g)(3). It further explicitly subjected financial subsidiaries to "affiliate" requirements,

while omitting operating subsidiaries from those requirements. 12 U.S.C. § 371c(e)(2). National banks thus have explicit Congressional authorization to engage in real estate activities, and implicit authorization to conduct national bank business through operating subsidiaries. Finally, the Commissioner concedes that the state would have no authority to enforce the statutes at issue against Wachovia Bank itself.

It is long-established that a state cannot regulate a national bank where doing so would "prevent or significantly interfere with the national bank's exercise of its powers." Barnett Bank, 517 U.S. at 33-34. Similarly, state regulations that "interfere[] with a power which national banks are authorized to exercise" irreconcilably conflict with the federal statute and are preempted by operation of the Supremacy Clause. Wells Fargo Bank of Texas, N.A. v. James, 321 F.3d 488, 491-92 (5th Cir. 2003). Thus, if a state regulation interferes with a national bank's operation of the business of banking through an operating subsidiary, a "power which national banks are authorized to exercise," that regulation is preempted.

State regulation of national bank wholly-owned subsidiaries could reasonably be conceived to have the same obstructive effect on national bank operations as they would if they were directed at the bank itself. If the state could regulate national bank subsidiaries like Wachovia Mortgage, it could, merely because of differences in corporate form, enforce regulations on activities which it could not regulate were they conducted through the bank itself. If, because of such regulation, the bank declined to utilize its ability to conduct its activity through the subsidiary, it would thus be hindered in its exercise of a recognized section 24(Seventh) "incidental" power. Wells Fargo Bank of Texas, 321 F.3d at 491-92. Section 7.4006 is

designed to prevent state actions, like the Commissioner's attempt to apply Conn. Gen. Stat. §§ 36a-486 and 36a-51's licencing requirements to Wachovia Mortgage, that hinder a national bank in the exercise of its authorized powers through a subsidiary.

In this case in particular, the Commissioner's threatened enforcement of the Connecticut statutes would interfere with two powers which the bank is authorized to exercise – the establishment of subsidiaries and the authority to engage in real estate lending. As the American Bankers Association argues in its brief amicus curiae [Dkt No. 42], the evolution of the banking industry, and specifically the mortgage-lending business, has resulted in a market structure which favors, if not necessitates, the subsidiary structure at issue here. As the Association explained, "because of the way that the residential home mortgage market has developed, the establishment of a separate operating subsidiary is the most efficient way for federally-chartered banking institutions to conduct the business of mortgage lending," and "restricting national bank's use of the operating subsidiary structure would frustrate their ability to compete and create greater risk for the bank's depositors and for the government." Id. at 6. Thus, the OCC's determination, that state regulation of operating subsidiaries to a greater extent than regulation of national banks themselves would potentially hinder the bank's "incidental" power, granted by regulation and implicitly acknowledged by statute, to conduct its banking business through a subsidiary, is reasonable.

The core of the Commissioner's argument, which focuses on the importance of allowing Connecticut to regulate the operations at issue here, is a policy one. While a state may have a legitimate interest in protecting mortgage lending abuses within its borders, that interest is

not before the court. Courts have repeatedly acknowledged that the Act's preemption of state law at times creates disparities between the national bank and state bank competitors, and may at times even create a competitive advantage in the national bank. See, e.g., First Union, 48 F. Supp. 2d at 138; see also Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954).[8]

Preemption, however, depends on the reasonableness of the OCC's interpretation of the statute, not on a court's assessment of the equities. That assessment is entrusted by Congress to the agency. The court will defer to the agency's decision "if [its] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." De La Cuesta, 458 U.S. at 154 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)). While the OCC's conclusion might not be the only conclusion that could be reached, the issue here is thus not how this court would interpret the statute in the first instance, or the policy choice that it would make, but whether the OCC's interpretation was "reasonable" or "permissible." As the Supreme Court cautioned in Chevron, "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do." Chevron, 467 U.S. at

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[8] The subsidiaries at issue here, however, are covered by substantive OCC regulation. 12 CFR § 5.34.

866.

The court finds that section 7.4006 is a reasonable interpretation of the National Bank Act. Therefore, plaintiffs are entitled to a declaratory judgment that the Commissioner cannot enforce the Connecticut state laws in issue against Wachovia Bank's operating subsidiary, Wachovia Mortgage, in connection with the mortgage lending business of the latter.

C. Section 1983

Wachovia also asserts claims against the Commissioner under 42 U.S.C. § 1983 for deprivation of the rights granted to it by the National Bank Act. The state argues that Wachovia cannot maintain these claims because, while "the Supremacy Clause can be used to enjoin enforcement of a state statute that runs afoul of a federal legislative scheme, it does not provide a basis for a claim under section 1983." Def.'s Opp. and Cross-Motion for Summ. J. at 18-19 (quoting Western Air Lines v. Port Auth. of New York and New Jersey, 817 F.2d 222, 225-26 (2d Cir. 1987)).

The defendant correctly points out that just because a federal law preempts a state law does not mean that there is a right of action under § 1983. However, the plaintiffs' claim is different: they argue that they may use § 1983 to pursue vindication of the rights granted to them by the National Bank Act. The "mere coincidence that the federal law in question in this case contains its own preemption language does not affect" the analysis as to whether it may also provide the basis for an action under § 1983. Western Air Lines, 817 F.2d at 225-26.

The plaintiffs' claim thus implicates the tripartite

test of Blessing v. Freestone. 520 U.S. 329 (1997). Accordingly, this court must examine whether Congress "intended that the provision in question benefit the plaintiff"; whether "the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence"; and whether "the provision giving rise to the asserted right [is] couched in mandatory, rather than precatory, terms." Id. at 340-341 (internal quotation marks omitted).

1. Wachovia Bank

The first step in analyzing whether a private plaintiff can use § 1983 for enforcing an alleged federal "right" against a state is to determine "whether Congress *intended to create a federal right.*" Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (emphasis in original). For the statute to create such a right, it must "confer rights on a particular class of persons," id. at 285, and be "phrased in terms of the persons benefitted," id. at 284 (internal quotations omitted). The Supreme Court has emphasized that, because "[s]ection 1983 provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States . . . it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." Id. at 283.

The National Bank Act was clearly intended to confer advantages on national banks like Wachovia, and, more particularly, the precise benefit of being free from state visitation. The statute explicitly provides, "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any

committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a). As discussed supra, the statute does not explicitly discuss whether it intends to preempt state licensing of a national bank's mortgage-lending subsidiary, but it is reasonable and within the OCC's authority to interpret this preclusion against visitation to extend to that activity. No matter how "visitation" is defined, however, Congress clearly intended that national banks be subject to federal visitation only, except where specifically provided.[9]

Moreover, that advantage is a "right" within the meaning of § 1983. Whereas other statutes simply set forth a ban on certain conduct, here Congress expressly phrased § 484 with an "unmistakable focus on the benefitted class." Gonzaga, 536 U.S. at 287 (quoting Cannon, 441 U.S. at 690-93). Like the language in Titles VI and IX, which provides that "no person . . . shall . . . be subjected to discrimination," and has been found to confer enforceable rights, see Cannon v. Univ. of Chicago, 441 U.S. 677, 691 (1979), section 484 similarly decrees that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." 12 U.S.C. § 484. Here, Congress also made explicit its intent to alter the "usual constitutional balance between the states and the federal government." Gonzaga, 536 U.S. at 286 (quoting Will v. Michigan Dept. Of State Police, 491 U.S. 58, 65 (1989)). In light of these considerations, the court concludes that Congress intended to create a federal right vis-a- vis national banks.

Nor is this right "so 'vague and amorphous' that

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[9] Nor is there any administrative mechanism for enforcing that right. See Gonzaga, 536 U.S. at 280 (quoting Wright v. Roanoke Redev. and Housing Auth., 479 U.S. 418, 426 (1987)).

its enforcement would strain judicial competence." Blessing, 520 U.S. at 340-41. Rather, it is limited and concrete, providing a national bank with a cause of action under section 1983 only when its right to be free from unlawful visitation pursuant to section 484, as determined according to the applicable regulatory scheme, has been impinged upon.

Finally, section 484 is "couched in mandatory, rather than precatory, terms." Blessing, 520 U.S. at 340-341. Unlike the statute at issue in King v. Town of Hempstead, 161 F.3d 112, 115 (2d Cir. 1998), section 484 is not phrased in terms of "goals" or "objectives," but instead mandates that national banks may be subject to only those visitorial powers authorized by federal law. This satisfies the third prong of the Blessing test.

2. Wachovia Mortgage

Wachovia Mortgage's ability to pursue a section 1983 claim is less clear. Wachovia Mortgage derives its injured "right" not from statute itself, but from regulation, section 7.4006. The courts of appeal are divided on whether a regulation can create a federal right enforceable through section 1983, though the recent trend is to find that an agency regulation, alone, cannot create a 1983 right. Compare Save Our Valley v. Sound Transit, 335 F.3d 932, 940 (9th Cir. 2003) (action can be maintained under regulations only where right is created by statute, and merely defined in scope by regulations); S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., 274 F.3d 771, 784 (3d Cir. 2001); Harris v. James, 127 F.3d 993, 1008 (11th Cir. 1997); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) (regulation cannot create enforceable § 1983 interest not already implicit in the enforcing statute); with Loschavo v. City of Dearborn, 33 F.3d 548, 553 (6th

Cir. 1994) (regulation can create federal right for purposes of § 1983); and with Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985). The Second Circuit has declined to reach this issue. King, 161 F.3d at 115.

The Supreme Court has emphasized that cases involving rights of action pursuant to section 1983 are not separate and distinct from those discussing rights of action implied from other statutes. See Gonzaga, 536 U.S. at 283. While the inquiries are different, the Court emphasized that the first step is the same, "in either case, we must first determine whether Congress intended to create a federal right." Id. (emphasis added); see also Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("like substantive federal law itself, private rights of action to enforce federal law must be created by Congress"); Save Our Valley, 335 F.3d at 938-40 (discussing Supreme Court's implied right of action and section 1983 jurisprudence).

It cannot be said, however, that Congress affirmatively intended the interest that section 7.4006 confers on national bank subsidiaries. See Save Our Valley, 335 F.3d at 940 (action can be maintained under regulations only where right is created by statute, and merely defined in scope by regulations); Smith, 821 F.2d at 984. As examined at length in relation to step one of Chevron, the statutes here are silent with respect to national bank operating subsidiaries. It thus cannot be said that Wachovia Mortgage's "right" was created by the National Bank Act itself. Rather, that "right" was created as to Wachovia Bank, through section 24(Seventh). Section 7.4006 defines the scope of that right as to Wachovia Bank and other national banks, and is a reasonable exercise of the OCC's authority in its visitorial authority over such banks. However, while reasonable, the regulation does not create a statutory right as to Wachovia Mortgage, enforceable under

section 1983.

III. CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment [Dkt. No. 11] is GRANTED on both the preemption claim and Wachovia Bank's § 1983 claim. The Defendant's Cross-Motion for Summary Judgment [Dkt. No. 21 is DENIED, except as GRANTED on Wachovia Mortgage's § 1983 claim. **SO ORDERED.**

Dated this 1st day of June, 2004, at Bridgeport, Connecticut.

/s/ Janet C. Hall
Janet C. Hall United States District Judge